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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1628

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION, *Petitioners,*

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES, INCORPORATED, *Respondents.*

On Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (JA xvi)[1] is reported at 476 F.2d 338. The opinion of the district court (JA. 103) is reported at 355 F.Supp. 618.

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[1] "JA" refers to the printed Joint Appendix filed in this Court under Rule 36.1 in the present case and in No. 72-1633. "JE" refers to the printed Exhibit Volume of the Joint Appendix. References to the original record are indicated by "R."

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1973. The petition for writ of certiorari was filed on June 1, 1973, and was granted by this Court on October 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the district court was based on 28 U.S.C. §1338.

The Court simultaneously granted certiorari for the conditional Cross-Petition, No. 72-1633, filed by Columbia Broadcasting System and others, who are respondents to this Petition. Several contentions rejected by the courts below are renewed in this Cross-Petition.

QUESTIONS PRESENTED

In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) this Court held that a community antenna television system (CATV) [2], which received and amplified signals broadcast by television stations and distributed the signals through the system to the subscribers' homes where the subscribers could view the program on their own television sets, did not perform the copyrighted programs which were broadcast.

The court of appeals here constructed a novel concept of "distant signals" based on the use of a particular receiving antenna technology. The court held that if the antenna on which the broadcast was received was not "in," "near" or "adjacent to" the CATV community and required a "transmittal device" such as cable or microwave to bring the signal to the CATV distribution system, the broadcast signals received by

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[2] CATV systems are sometimes referred to as cable television systems.

the CATV would be what it called "distant signals." Reception and distribution to subscribers of "distant signals" so defined, the court held, is a performance and hence infringement of the copyright of the program being broadcast.

The questions presented on this petition are as follows:[3]

1. Whether the reception by petitioners' CATV systems of television signals (broadcast by the station with the copyright owner's authorization for reception by the public) and the distribution of those signals to subscribers is converted into a "performance" of the program "in public" within the meaning of §1 (c) and (d) of the Copyright Act because the signals so received are "distant signals."

2. Whether the court below announced a rule contrary to the policies of the Copyright Act and the Communications Act imposing copyright infringement liability on CATV systems, thus denying members of the public the right to use a CATV service to receive broadcasts which under the Communications Act are "intended to be received by the public."

3. Whether the statutory copyright monopoly should be judicially extended to hold a CATV system liable for reception of "distant signals" whose reception is authorized by the F.C.C. and when such an extension

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[3] Respondents' contentions that origination of programs by petitioners' CATV systems on non-broadcast channels, the sale of advertising in connection with such origination on non-broadcast channels, and the "interconnection" of petitioners' CATV systems so that more than one system originated the same program on a non-broadcast channel, converts the reception service into a performance, are raised in No. 72-1633 to be heard jointly with this petition.

would be in conflict with one of the key elements of the F.C.C.'s regulatory scheme.

4. Whether a homeowner's right to choose a CATV antenna service to receive broadcasts which are "intended to be received by the public" is protected by a license implied-in-law under the Copyright Act and the Communications Act.

STATUTES AND REGULATIONS INVOLVED

1. *Copyright Act.* Sections 1 (c) and 1 (d) of the Copyright Act (17 U.S.C. §§1 (c), (d)), are set forth in the Appendix to this brief, *infra* p. 81.

2. *Communications Act of 1934, as amended.* Sections 1, 3 (o), 303 (c), (d) and (h), 307(b) and 325 (a) of the Communications Act (47 U.S.C. §§151, 153 (o), 303 (c), (d) and (h), 307(b) and 325(a)) are set forth in the Appendix, *infra* p. 82-83.

3. *F.C.C. Regulation of CATV.* The background and development of the regulation of CATV by the Federal Communications Commission are set out in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), which upheld the Commission's jurisdiction over CATV.

The detailed and comprehensive regulations authorizing CATV reception service to be made available to the public to receive broadcasts (47 C.F.R. Part 76 and Part 78) are discussed in the Commission's *Cable Television Report and Order*, 36 F.C.C. 2d 141 (1972)[4] and its *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36

[4] Referred to hereinafter as *"Cable Television Report and Order."*

F.C.C. 2d 326 (1972).[5] The regulations are voluminous and therefore are not printed in the Appendix. They authorized CATV systems to make available a reception service to members of the public choosing the service to receive broadcast signals, including "distant signals" whose reception and distribution the court below found to constitute infringement.[6]

STATEMENT

Columbia Broadcasting System (CBS)[7] brought this proceeding in 1964 (prior to the trial in *Fortnightly)* asserting rights under the Copyright Act to stop CATV reception of signals broadcast by its affiliated stations, stating as its purpose that it wanted to preserve "the present system of nationwide program distribution by the television networks through their affiliated stations . . ." (JE 470). After this Court's *Fortnightly* decision, respondents continued prosecution of the case, twice supplementing their complaint, and asserting a number of contentions to attempt to distinguish petitioners' CATVs involved in this case from Fortnightly's CATVs.

A television station's "coverage area," CBS contended, is marked by the area where the broadcast can be received on a housetop antenna. CBS argued that the use of any other antenna technology such as CATV to receive the broadcasts, even though use of that technology is authorized by the F.C.C. under carefully de-

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[5] Referred to hereinafter as *"Memorandum Opinion and Order on Reconsideration."*

[6] 47 C.F.R., Part 76, subpart D; *Cable Television Report and Order, supra* n. 4, ¶ 89, at 177. See discussion *infra* 14-17.

[7] The other respondents are copyright proprietors who licensed their programs to CBS for broadcast.

fined rules, results in an "importation" of a distant signal extending the station's "coverage area" and thereby converting the entire CATV reception service of both "distant" and other signals into an infringing performance of all broadcasts received. CBS seeks to limit the holding in *Fortnightly* so that it can use its copyrights to prevent the public's use of CATV to "extend" the station's "coverage area," and thus to reenforce its market delineation purposes in administering and profiting from a television network.

The court below accepted CBS' contention in part. It constructed its own definition of "distant signal" by holding that, if one antenna technology was used to receive a broadcast signal it was not a performance, but if another technology (authorized by the F.C.C.) was used by the CATV, the reception was converted into a performance and therefore an infringement. But the court rejected CBS' contention that the reception of "distant signals" on one channel converted all of the CATV system's reception service (i.e. "local" stations on other channels as well) into performance and therefore infringement.

1. Petitioners' CATV Systems.

There is essentially no dispute as to the operation and equipment of petitioners' CATV systems. There are two lengthy stipulations which cover the systems in detail (JA 148-261).

Petitioners own and operate CATV systems in a number of communities. Three systems—Farmington, Great Falls and Rawlins—are involved in this petition.[8] Respondents own programs on which copy-

[8] Five of petitioners' CATV systems were named in the complaint—the three involved in this Petition, plus the Elmira and New York City CATVs.

right was assumed for purposes of the trial of the first stage.[9] CBS, acting on its own behalf and pursuant to contract with other respondents, authorized television stations to broadcast these programs. The programs were broadcast in the regular course by the television stations. Each of petitioners' CATV systems operated 24 hours a day and received and distributed to its subscribers the signals broadcast by the stations referred to in the complaint.

The broadcast signals were received off-the-air on television receiving antennas and distributed instantaneously and without editing or change through microwave and cable connections from the antennas where the signals were received to the subscribers' homes.[10]

2. Television Broadcasting and Reception.

The function of broadcasting. Broadcasters are licensed by the F.C.C. to use a designated frequency in the publicly owned radio spectrum for the statutory purpose of broadcasting for reception by the public.[11]

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[9] Pursuant to pretrial orders (JA 71-72, 101) the issue whether the operation of petitioners' systems constituted a public performance of the copyrighted works, and the issue whether such operations in aiding reception by the public of broadcasts licensed by the copyright owner were protected by a license implied-in-law under the Copyright Act and the Communications Act, were tried in the first stage separately from other defenses and issues.

[10] Subscribers provide their own television sets. Petitioners did not rent, sell or repair sets. There is no evidence in the record that any subscriber actually viewed these programs.

[11] Broadcasting is defined by the Communications Act (47 U.S.C. 153(o)) as follows:

> "'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

The technology of broadcasting is set out in detail in the stipulations (JA 165-174).

Broadcasters secure programs directly from copyright owners or through affiliation with a network. A broadcaster converts those programs into television signals which are broadcast for public reception. A broadcaster is required to identify himself in connection with each broadcast and has a specific personal responsibility for all programs or other material which he broadcasts. The F.C.C. application form for a broadcast license repeats the Commission's Policy Statement that

> "[b]roadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public . . . This duty is personal to the licensee and may not be delegated" (JE 493).

The contracts between CBS and its affiliates recognize that the affiliate has a personal obligation to select or reject each program in accordance with the F.C.C. policy (JE 253, 255; JA 304).

The function of reception. To receive a TV broadcast there must be a receiving antenna and a connection by wire or other means to conduct the signal from the receiving antenna to the TV set. Each TV set has an antenna built into it. If a member of the public desires, he can secure a better antenna and a better location for the antenna. Under F.C.C. regulations entrepreneurs are authorized to make CATV antenna service available to members of the public desiring to use that service for reception of broadcasts. What stations' broadcasts a member of the public can receive will depend on the antenna or antenna service he selects.

The function of petitioners' CATV systems. Petitioners offer CATV reception service to members of

the public in a number of communities. The complaint refers to five of petitioners' systems. Details as to the operation of these five systems are set out in the stipulations. With respect to three of these systems (Farmington, Great Falls and Rawlins) the court below found that they received "distant signals" which under its rule changed the function of reception as to those signals into the equivalent of a "broadcasting" function and therefore a performance.[12]

All of petitioners' CATV systems operated in the same way. The systems were "on" 24 hours a day. The broadcast signals received by the systems were distributed instantaneously, each on its own separate channel, to subscribers; no recording[13] or any other such device was employed. Petitioners' systems handled only the signals as electromagnetic energy; the sights and sounds of the progams appeared only when a subscriber chose to operate his own TV set.[14]

Petitioners had no advance knowledge of, or control over, what programs were to be broadcast by any television station. The broadcasts on each channel were not edited in any way. The subscriber received the entire broadcast, including station identification and commercials. This is in accord with the F.C.C. CATV reg-

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[12] The three systems are described *infra*, pp. 21-26. The details as to antennas used, location of antennas and the means used to connect the antennas to the subscriber's set are set out in stipulations. (JA 186-192, 220-228, 235-240, 267-271).

[13] With respect only to Farmington CATV, it recorded certain educational programs broadcast by the Albuquerque educational station, with the consent of that station, for subsequent distribution to the Farmington school system on a non-broadcast channel. (JA 199; JE 340-43).

[14] Petitioners do not rent, sell or service subscribers' TV sets.

ulation that a broadcast shall be "carried in full, without deletion or alteration of any portion except as required by this part" (47 C.F.R. §76.55 (b)).[15]

Petitioners made available to subscribers in this manner all broadcast signals received—both "distant signals" and non-distant signals—without alteration or concern for their content, except as they were required to give "nonduplication protection" under

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[15] Since 1965 the Commission has by regulation required certain stations to be received and to be protected against a competing signal received by a CATV. *First Report and Order on Microwave-Served CATV*, 38 F.C.C. 683 (1965); *Second Report and Order on Community Antenna Television Systems*, 2 F.C.C. 2d 725 (1966). Under the rules, which were upheld by this Court in *Southwestern*, CATV systems were required to receive stations within whose Grade B contour the CATV was located and to block out or give nonduplication protection if another station broadcast the same program.

The Grade B contour is a line calculated on engineering assumptions along which good reception may be expected 90% of the time at 50% of the locations. 47 C.F.R. § 73.684; Stipulation No. 1, ¶ 60A, n. * (JA 186).

The F.C.C. has made changes in its determination as to which stations must be received and be protected under this rule. The current nonduplication rules are found in 47 C.F.R., Part 76, subpart D and require a CATV to carry and give nonduplication protection to any commercial station when it is located within a 35 mile zone (generally smaller than the Grade B contour) of a station. CATV systems not in any station's 35 mile zone are required to carry all Grade B contour signals of commercial and educational stations. "Significantly viewed signals" as defined in § 76.54 are also required to be carried and protected.

The current rules provide also under a priority system that a CATV system located within the Grade B contour of a station must maintain the station's exclusivity as to network programs against stations with lower priority. The rules also provide for protection of exclusivity of syndicated programs by CATV systems located in the 35 mile zone of the 100 major television markets. 47 C.F.R., Part 76, subpart F; 47 C.F.R. § 76.51.

the F.C.C. rules.[16] Petitioners provided subscribers with a connection to the CATV system for a flat monthly rate (in the range of $5.00-$7.50)[17] regardless of whether the subscriber used his TV set and without regard to what programs the homeowner viewed, if any.[18] It is stipulated that no residential home subscriber infringed any copyright by viewing the copyrighted programs (JA 164).

3. "Distant Signals".

The operations of petitioners' CATV systems were the same with respect to all broadcasts received, whether "distant" or nondistant signals were involved. Respondents urged in the courts below that reception of what they called "distant signals" (a definition different from that constructed by the court below—see *infra*, pp. 27-29) converted the entire CATV operation into a broadcasting function, and that therefore the CATV "performed" the programs in all broadcast signals received, both with respect to the "distant signals" as they defined them and all nondistant signals received. The court below rejected the contention that the whole CATV operation was converted into a performance of every broadcast signal received by reason of receiving some "distant" signals, but concluded that the CATV reception became a "broadcasting" function with respect to "distant signals" as it defined the term, and

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[16] See n. 15, *supra*.

[17] See JE 338-39. In some cases, there was an installation charge ($10-$20), and also a small additional monthly charge for the connection to additional television sets in the subscriber's home.

[18] There is no evidence in the record that any of the allegedly infringed programs were viewed by a subscriber.

therefore a performance of the copyrighted programs embodied therein.

The court below recognized that "a precise judicial definition of a distant signal is not possible" (JA xxxv; 476 F.2d at 350). To use the F.C.C. rule regarding "distant" and "local" signals under the rules on priority of reception and nonduplication (see n. 15 *supra*) for copyright purposes, the court said, "would fly in the face of the mandate of *Fortnightly*" (JA xxxv; 476 F.2d at 350). The court therefore constructed its own definition of "distant signal." (See discussion *infra*, pp. 27-29.)

There is no engineering definition of a "distant signal." Respondents' engineering expert (Davis) conceded that he did not "really know how you define a distant signal" (JA 345). He referred to reception by conventional rooftop antennas at distances of 130 miles (JA 356).[19] Respondents offered no testimony as to the significance of any particular distance from a copyright point of view or as to determining the point in distance at which a reception ceases to be a reception and becomes a performance.

Moreover, while the word "distant" is used, it is clear that distance in respondents' contention and under the definition of the court below is not a matter merely of miles. One of respondents' witnesses (Moore) testified that the New York CATV system in receiving signals of New York City TV stations was importing "distant

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[19] Petitioners' expert (Cohen) referred to reception by conventional rooftop antennas at distances of 150-180 miles (JA 477-478). Reception at much greater distances is possible—e.g., broadcasts from the moon. Terrain such as mountains or the curvature of the earth blocks signals and prevents their reception on conventional housetop antennas.

signals" and therefore "functionally equivalent to a broadcaster" because terrain and tall buildings made the signals "unavailable to some people except on CATV."[20] The Durango station whose reception the court below held to be a "distant signal" was 43 miles from the Farmington CATV (JA 186) while the reception of signals in Elmira from stations 119 miles away (JA 206) was not. Nor was any testimony offered as a basis for distinguishing between larger and smaller distances.[21]

4. Respondents' Contention as to "Coverage Area".

Respondents' contention does not begin with distance but what is desirable economics from their point of view as a network and a copyright proprietor. A television station, they assert, has a "market" or "coverage area" limited by reception on conventional rooftop antennas. It is in the best interest of the copyright owner, according to respondents' analysis, if there is no reception of a broadcast outside a licensed station's "market area," and thus respondents assert that copyright owners "intend" that the broadcast be received by the public only within this "market area". If the only permissible reception is in this "market area", a copyright owner's ability to increase his royalties, they assert, is improved since his ability to license his copyright is improved with respect to broadcasters outside

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[20] JA 406-408. Reception is blocked in many locations in New York City by building or terrain. In other locations reception is impaired because the signal "bounces" off buildings causing "ghosts," snow and poor reception (JA 476-477, 501-502).

[21] Respondents' witness (Gray) who at one time owned a CATV system in Utica saw no copyright significance in reception at distances of 100-130 miles and did not view that as changing the function of his Utica CATV (JA 381, 387).

the market area.[22] In addition, from the network point of view, confining reception to the affiliate's "market area" reduces "duplication" of coverage and competition between affiliated stations for viewers outside each station's "market area" and thereby assures that advertisers must buy the network's entire line-up of affiliates in order to cover all market areas.[23] The next step in respondents' bootstrap argument founded on their economic interest is to categorize CATV reception outside the "market area" as "importation" of "distant" signals, and argue that such "importation' of "distant signals" reflects the "functional equivalent" of broadcasting and is thus converted into a "performance."

Respondents' definition of a station's "market area" or "coverage area" is based on two elements: (1) F.C.C. rules which fix the location, height and power of a TV station's antenna and (2) the area where reception on a conventional housetop antenna is possible.

5. F.C.C. Rules as to Reception and Coverage.

As to the F.C.C. rules, the record shows that while the F.C.C. in a broadcaster's license fixes the location, height and power of the broadcast antenna, it does not

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[22] The theory appears to be that the copyright proprietor would be able to receive higher aggregate royalties through separate exclusive licenses to many broadcast licensees with delimited market areas because exclusivity in each such license area can be guaranteed.

[23] In this manner the network attempts to achieve a result through control of copyrights and reception which it formerly achieved through pure economic power over advertisers with network "must buy" practices. These "must buy" practices were severely criticized by an F.C.C. staff study, the "Barrow Report". *House Committee on Interstate and Foreign Commerce, Network Broadcasting*, H. Rep. No. 1297, 85th Cong., 2d Sess., Chapt. IX (1958). Pure "must buy" was then abandoned by the networks.

mark any limits as to reception by the public. The broadcaster's license authorizes it to "use and operate the radio transmitting apparatus" described in the license "for the purpose of broadcasting"[24] which under the statute must be "intended to be received by the public" (47 U.S.C. 153(o)). The broadcaster has no authority and no physical means to prevent reception of the signal by the public once it is broadcast.

The F.C.C. CATV regulations are the only regulations relating to the choice by the public of a receiving antenna. Respondents offered no evidence and have pointed to no regulation which forms the basis for selecting a housetop antenna or other antenna as the reception technology which must be used to mark a station's "market area." Respondents' contention ignores the fact that the F.C.C. has authorized the use of CATV antenna service to receive broadcasts.

The F.C.C. regulations not only do not provide any basis for selection of a house-top antenna as the one permissible antenna technology, but the record shows that the F.C.C. specifically authorized the equipment and technology used by the three CATV systems to receive "distant signals" under either respondents' definition or the definition of the court below. The Farmington, Great Falls and Rawlins systems had antennas located a number of miles from the CATV community on which the alleged "distant signals" were received (for details see *infra* pp. 21-26), with a connection between the receiving antenna and the CATV's

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[24] F.C.C. Form No. 325B, Television Station Broadcast License (JE 486-487).

cable distribution system in the community provided by microwave.[25]

Microwave transmission is point-to-point transmission of radio frequencies through the air, and all uses of microwave must be licensed by the F.C.C.[26] An applicant for a microwave license must describe the service intended, location of microwave equipment and signals to be transmitted. 47 C.F.R. § 78.15. The regulations cover microwave links for transmission of broadcast signals from the point where they are received to a point "from which the signals are distributed to the public by cable." 47 C.F.R. § 78.5(b) [27].

In the application for each use of microwave in this case, the stations to be received (which broadcast the "distant signals") were identified as well as the proposed transmission of the signals from the receiving antenna to the identified CATV system where the signals were to be distributed by cable to subscribers. The microwave licenses[28] issued by the F.C.C. authorized each use of microwave for the reception of the

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[25] Microwave is point-to-point transmission which the district court and the court below found analogous to a wire or cable (JA 119-20; 355 F. Supp. at 623) (JA xxxi-xxxii; 476 F.2d at 348-49). Both courts held that microwave transmission is not broadcasting since it is not intended to, and cannot be received by the public.

[26] F.C.C. Regulations "Point-to-Point Microwave Radio Service" (47 C.F.R. §§ 21.700 et seq.) cover all uses of microwave by common carriers, such as A T & T, as well as microwave "to relay television signals to community antenna television systems . . . ." *Id.* § 21.700.

[27] Formerly, 47 C.F.R. § 74.1001(f). See also 47 C.F.R. § 21.709, 78.5(a), formerly §§ 74.1001(a), 91.559, 91.561.

[28] JA 160; JE 359-372, 386-88.

"distant signals" whose reception was "deemed" by the court below to be a performance and therefore infringing.

6. The Station's "Coverage Area" in Television Economics.

The preferred economics of networks and copyright owners, which respondents use as a logical device to justify their definition of a station's "market area" ignores the uncontroverted evidence in the record that, in the economics of the television industry, the entire audience of a television station or of a network is included in the "coverage area" or "market" of the station or network, including the CATV subscribers who received "distant signals" under the definition of the court below. (See discussion *infra*, pp. 56-64.)

Mr. Aubrey (then President of CBS) testified that television is a "mass medium" and that advertisers, stations and program suppliers are interested in audience size. Selection of affiliates by the network, rates paid to affiliates by the networks, pricing of time to advertisers, and fees paid for programs are influenced by audience size (JE 520-21, 280-90).

Measurement of the audience upon which these calculations depend is by use of rating services, the principal ones being American Research Bureau (ARB) and Nielsen.[29] ARB and Nielsen by a sampling technique measure the size of audience and the share of audience for a station or network and for individual

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[29] The sampling methods are described in the ARB brochure *Television Audience Research Basics*. JE 415-420. As early as 1961 ARB included CATV viewers in its sample and measurements. JE 421-422.

programs and for particular time slots.[20] CBS uses the Nielsen ratings to determine network share of audience and ARB reports to determine a station's audience (JE 520). Both ARB and Nielsen include CATV subscribers in the audience measured.[21] ARB publishes reports every month, and Nielsen reports every two weeks. The results of the ARB surveys of station coverage, including the CATV coverage, are published annually in the *Television Factbook*, a standard industry reference book.[22] The standing of this rating service is shown by the fact that the F.C.C. used ARB ratings in its survey of "significantly viewed" stations under its CATV rules.[23]

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[20] Extracts from samples of reports are contained in the record (JE 423-58, 500-18, 537-39). The reports contain detailed demographic information as to the audience as measured and extensive comparative information.

ARB measures the number of homes in particular counties viewing a particular station or stations. The national audience figures are a combination of these surveys.

Nielsen provides national ratings and share of audience ratings.

[21] The sampling technique used by ARB to measure audience is described in each ARB monthly report, extracts of which for Albuquerque, Denver and Spokane stations appear at JE 423-458. The CATV "control" used by ARB in measuring the audience subscribing to CATV is described at JE 444, 454, and the counties subject to CATV "control are noted at JE 430-431, 438, 449.

The sampling technique used by Nielsen in each bi-weekly report is described in each report, extracts of which for June, 1969 and March 1971 appear at JE 500-509, 510-518. The method used to measure CATV subscribers as part of the audience is described at JE 509, ¶ (f), 515 ¶ (f). In 1971, CATV subscribers were 10% of Nielsen's national sample.

[22] Relevant pages from the *Television Factbook* appear at JE 525-534.

[23] The F.C.C. used ARB reports for two purposes under its CATV rules: first, to rank television markets and second, to determine what stations were "significantly viewed" under its new

Petitioners' CATV subscribers were included by the rating services in the audience of the stations held by the court below to be "distant" stations.[34]

Stations, networks, advertisers and program suppliers use the rating service to determine the audience of a station or network or the share of the viewing audience or network secured as against competing stations or networks. Respondents offered no evidence that a station did not desire the largest audience and did not claim its entire audience, including CATV viewers. On the contrary, CBS Vice President Jenks testified that the CBS "affiliate desires to emphasize every possible coverage aspect in order to attract the network and argue for higher rates" and that ARB reports are "one means used for that purpose". (JA 308) The record shows the use by the stations of the rating services, including the CATV audience, in

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compulsory carriage rules. *Cable Television Report and Order, supra* n. 4, ¶¶ 85-86, at 175-76; *Memorandum Opinion and Order on Reconsideration, supra* n. 5, ¶¶ 54-57, at 345-47. For these determinations related to the compulsory carriage rule, the Commission concluded that it should make its determination based on reception by conventional means in order to determine how CATV reception should be authorized or required. To do this a special study by ARB was made; excluding CATV viewers was necessary, since ARB ratings normally include CATV viewers. *Memorandum Opinion and Order on Reconsideration, supra n.* 5, ¶ 55, n. 13, at 347.

[34] ARB reports are by county. Carbon County, Wyoming, where Rawlins is located is within the Denver station's coverage area in the June, 1969 Report. JE 451. Cascade County, Montana, where Great Falls is located is in the Spokane station area in the June 1969 report. JE 458. The *Television Factbook* Stations Volume, 1972-1973 Ed., based on February/March 1971 ARB surveys shows San Juan County, New Mexico where Farmington is located in the KTTV (Los Angeles) coverage area. (p. 91b). For the Durango station, see *Television Factbook*, Stations Volume, 1973-74 Ed., p. 136b.

solicitation of advertisers. JE 357-58, 459-68, 640; see also JA 308-09, 388-89, 510-11, 513. Mr. Jenks further testified that the rating service reports were used in negotiations with affiliates to fix rates the affiliates would be paid. The formula used by the network in these negotiations, and records from CBS' files, demonstrate that stations sought and got higher rates because of the size of the audience (including CATV viewers) as shown by the rating services. JE 520-22, 280-290.

Program suppliers also used the rating services. Copyright owners Reel and Chertok testified that they wanted the largest audience for their programs and that Nielsen reports including CATV subscribers in the audience were used in promoting the licensing of their programs.[25]

The significance of the rating services in the industry economics is shown by the decision of the Cost of Living Council adopting a special rule for broadcasting. 6 C.F.R. § 150.206, adopted at 38 Fed. Reg. 27933 (October 10, 1973). In explaining that special rule the Council stated that "prices in this industry are based largely on audience response" and "fluctuations in audience size bring changes in price levels unrelated to cost considerations." 38 Fed. Reg. 27933, (October 10, 1973). To explain the basis for the special broadcasting regulation based on the use of rating services, the Council said (38 Fed. Reg. 27933-934):

> "As a general industry practice, advertising prices are determined according to size of audience indicated by independent audience surveys. A base rate expressed in terms of dollars per thousand listeners or viewers or households (re-

[25] JA 312, 439-440. Both said on cross-examination that they used Nielsen but that they were "unaware" CATV viewers were included in the audience and thus influenced the rating.

ferred to as "cost per thousand" or "CPM") is multiplied by the present or anticipated audience size to determine the price for the particular advertising unit concerned . . . ."[36]

Under the regulations the "base price" is determined by the cost per thousand at the base period multiplied by the present audience size for the program or advertising time based on an independent rating service. The Cost of Living Council also exempted producers and distributors of motion pictures and TV shows because "historically, pricing in the industry is based upon anticipated or actual public response to each film . . . ."[37]

7. The Alleged Infringements Involved in this Petition.

The complaint charged infringement by reason of reception of specific broadcasts on several dates in November, 1964, in June, 1969 and in March, 1971. The court below found no infringement in 1964, but found that in 1969 three of the systems (Farmington, Great Falls and Rawlins) received "distant signals" and that in 1971 one of these (Farmington) [38], received

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[36] A similar determination was made by the Price Commission as to broadcasting under Phase II regulations. 37 Fed. Reg. 13659 (July 12, 1972).

For networks the Price Commission adopted a policy that placed no ceiling on individual rates so long as the average of all rates did not increase. Stabilization Program Guidelines. CLC Release No. 101, May 10, 1972, reprinted in CCH ECONOMIC CONTROLS, STABILIZATION PROGRAM GUIDELINES, PHASE II RULES (Nov. 14, 1972-JAN. 10, 1973) ¶ 621.25.

[37] CLC Release No. 136, August 11, 1972, reprinted in CCH ECONOMIC CONTROLS, *supra* n. 36, at ¶ 595.54.

[38] Respondents' second supplemental complaint alleging infringements in March 1971 did not contain allegations with respect to the Rawlins and Great Falls CATVs.

"distant signals" within its definition, and hence were infringing. The facts with respect to these three systems and the signals received as reflected by the record are as follows:

1. *Farmington.*[39] There are no television stations in Farmington, which is located in a valley in the northwest corner of New Mexico with mountainous areas on several sides. In November 1964, the Farmington CATV's equipment had the capacity to receive and distribute five channels. The signals of four Alburquerque stations (144 miles from Farmington)—an affiliate of each network and an eductional station—were received off-the-air on an antenna on a mesa about 30 miles from Farmington. A microwave connection between the antenna and Farmington was used to conduct the signals to the CATV's cable system in the community, by which the signals were distributed to subscribers.[40]

The only holding by the court below of infringement with respect to 1969 involved reception by the Farmington CATV of the Durango CBS affiliate when the Alburquerque educational station was not broadcasting (it was a part time station). Reception of the Durango station in Farmington is blocked by a high intervening mountain. Its broadcasts were received at the antenna site on the mesa 30 miles away and

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[39] For details see the stipulations at JA 184-204, 266-275.

[40] Respondents' complaint charged that the reception of the Albuquerque stations was the importation of "distant" signals, under their market definition. The court below rejected that contention because the Albuquerque stations were receivable off-the-air on housetop antennas from translators located in or near Farmington. There is no issue as to 1964 presented by this petition.

transmitted by microwave licensed by the F.C.C. to Farmington where the signals were distributed to subscribers.

Durango is 43 miles from Farmington, and Farmington is within the Durango station's Grade B contour.[41] Under the F.C.C. rules referred to above (See n. 15 *supra*) regarding priority of reception and compulsory reception by a CATV system upon demand of a station, Durango was a "local station" which was entitled to, and which did, demand that its signals be received and carried on the Farmington CATV. The station and the CATV entered into an agreement (permissible under F.C.C. rules) under which the Durango station was received. The court below held that reception of Durango under these circumstances involved a "distant signal"[42] and was an infringement.[43]

In 1970 the Farmington system was rebuilt to increase its channel capacity from 5 to 12 channels.

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[41] "The Grade B contour of a television station is the boundary of a hypothetical area at whose outer limits television reception of 'a quality acceptable to the median viewer' is expected to be available at least 90 percent of the time at the best 50 percent of the receiver locations, based on expected field intensities and certain assumptions as to the nature and height of receiving antenna, and the capabilities of the television set . . . . These predicted contours are plotted on the basis of propagation charts and rules set forth in 47 C.F.R. § 3.684 of the F.C.C. Regulations." Stipulation No. 1 ¶ 60A n., JA 186.

[42] It held the receiving antenna was not "near" or "adjacent to" the CATV community. It was stipulated that because of the terrain the Durango signals could not be received on housetop or tower mounted antenna in Farmington (JA 186).

[43] The first and second supplemental complaints charged infringement by reason of the reception of the Albuquerque CBS affiliate which broadcast the same program as Durango; they did not specifically refer to the Durango station (JA 50-52, 89-91).

Microwave licenses were issued by the F.C.C. to a company, unrelated to petitioners, authorizing the transmission of the signals of four Los Angeles independent stations from an antenna site about 50 miles southeast of Los Angeles (where they were received off-the-air) to Farmington.[44] When that microwave link became available, the Farmington CATV utilized it to bring the signals to Farmington where they were distributed by the CATV. In March 1971 (the date of the alleged infringement) the system received the signals of Los Angeles station KTTV-TV which was broadcasting a program "syndicated" by CBS—i.e. licensed for broadcast by single stations rather than a network. In addition to the Los Angeles stations the system also continued to receive and carry the four Alburquerque stations, and Durango. The court below held the reception of the Los Angeles station and the Durango station in March 1971 involved "distant signals" and hence was an infringement.[45]

Rawlins.[46] Rawlins is an isolated community in south central Wyoming. JA 544-45. There is no television station in Rawlins. In June 1969 the Rawlins system had 12 channel equipment. The Casper station (87 miles away) which was not generally receivable in Rawlins except via translator rebroadcasts, was received by the CATV system on an antenna at the edge of town. In addition the system received five broadcast stations

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[44] The microwave was also licensed to carry these signals to a number of other CATV systems in California, Nevada and New Mexico. TELEVISION DIGEST INC., CATV AND STATION COVERAGE ATLAS 179a, No. 4. (1973 ed.).

[45] It was stipulated that the signals of the Los Angeles stations could not be received on a "housetop" or "tower mounted" antenna in Farmington (JA 267).

[46] For stipulated details see JA 234-245.

from Denver (184 miles from Rawlins)—an affiliate of each network, an independent and an educational station. The Denver stations were received off-the-air on an antenna about 90 (and 100) miles from Denver.[47] The signals so received were transmitted by microwave licensed by the F.C.C. to where they were distributed by the CATV system to subscribers.

The Denver stations, one of which broadcast the program which the court below found infringed, are the closest stations which could be received to provide subscribers with the broadcasts of three full network stations, as well as an independent and an educational station (JA 549).

Great Falls.[48] Great Falls is located in central Montana, and is a substantial distance from any major metropolitan center. In June 1969 Great Falls was a twelve channel system. It received nine broadcast stations. Two stations, neither of which was a full network station, were located in Great Falls. In addition it received three stations from Spokane (286 miles from Great Falls), one in Lethbridge, Canada (166 miles), two in Salt Lake City (466 miles) and one in Helena (71 miles). The signals of these stations were received off the air on antennas closer to the station (17 to 95 miles). The signals so received were transmitted by microwave licensed by the F.C.C. to Great Falls where they were then made available to subscribers.[49]

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[47] It was stipulated that the Denver stations could not be received on "housetop" or "tower mounted" antennas in Rawlins (JA 23).

[48] For stipulated details, see JA 218-233.

[49] It was stipulated that the stations in Spokane, Lethbridge, Salt Lake City and Helena could not be received on housetop or tower-mounted antennas in Great Falls. JA 219-220.

The Spokane stations, one of which broadcast the program which the court below found infringed, are the closest stations which could be received so as to enable subscribers to receive three full network stations. (JA 536).

THE DECISIONS BELOW

1. The district court analyzed the function played by the CATV systems in receiving and making broadcast signals available to subscribers. Applying the *Fortnightly* test as to the function of a CATV system in the process of television broadcasting and reception, the court held that the operation of petitioners' systems was on the viewer's side of the line and did not perform the copyrighted works. JA 122-139; 355 F. Supp. at 624-30.[50] With respect to the "distant signal" contention accepted by the court below, the district court noted that in *Fortnightly*, the CATV system carried the programs to additional viewers, viewers the district court in *Fortnightly* had found could not receive on their own antennas. What petitioners had done, the court concluded, "is to make its antenna even more 'well located' and even more 'efficiently' connected to a viewer's set than in *Fortnightly*."[51] JA 132-33; 355 F.Supp. at 628.

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[50] Upon analysis, the court rejected the other contentions of respondents as to the operation of petitioners' systems: microwave (JA 124-25; 355 F. Supp. at 625), "interconnection" (*Ibid.*), advertising (JA 125-26; 355 F. Supp. at 625-26), sale of commercials (JA 126; 355 F. Supp. at 626) and program origination (JA 134-36; 355 F. Supp. 628-29).

[51] Since the court found no "performance," it had no occasion to consider whether the CATV reception service was protected by a license implied-in-law.

2. The court of appeals affirmed the district court's decision on all contentions except that relating to "distant signals." *Fortnightly,* the court said, did not involve a CATV system which brought a signal "from another television market."[32] JA xxxii; 476 F.2d at 349. The court stated that in *Fortnightly* the signals were "already in the community" by reason of the location of the receiving antennas "in or directly adjacent" to the CATV communities. *Id.* Hinging its decision (erroneusly we submit; see *infra,* pp. 44-47), upon one sentence in *United States* v. *Southwestern Cable Co., supra,* the court below concluded that a CATV performed a different function when it was distributing signals that are "beyond the range of local antennas." JA xxxiii; 476 F.2d at 349. This did not constitute, the court said, use of "improved antenna technology" as in *Fortnightly,* but rather "importation of the signal . . . from a separate, distant community." JA xxxiv; 476 F.2d at 350. Thus, when a CATV distributes signals "that are beyond the range of local antennas," the CATV "to this extent" is "functionally equivalent to a broadcaster," and should be "deemed to 'perform' the programming distributed to subscribers on these imported signals." JA xxxiii; 476 F.2d at 349.

Much of the court's opinion was devoted to a definition of "distant signals." It recognized that a "precise judicial definition" is "not possible." JA. xxxv;

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[32] The court below, without discussing the evidence in the record that the CATV audience is included in the station's coverage area and exploited as part of the station's market in television economics, accepted the copyright owners' assertion that copyright earnings would be increased if CATV systems could not import "distant signals." JA xvii, n. 2; 476 F.2d at 342, n. 2.

476 F.2d at 350. A "distant signal" is one which could not be received, the court concluded, "in light of current broadcasting and receiving technology" on an antenna located in or near the CATV community and produce an image of "similar quality" to that from the antenna closer to the station. The court created a "presumption" that, where a CATV's antennas were not located in or near the CATV community, the signals would be considered "distant" unless the CATV could carry the "heavy burden" of showing to the contrary. JA xxxvi-xxxviii; 476 F.2d 351-52.

The court made clear that while it spoke of "distant signals," distance was not the key element. The key apparently is whether the signal is receivable in the community. Thus, where mountainous terrain blocked reception of the Durango signal in Farmington and the CATV antenna was on the mesa 30 miles out of town, the court held the CATV reception was an infringing reception of a "distant" signal although Farmington was only 43 miles from Durango and within the Durango station's B contour. This distance to the antenna location was too great to satisfy the court's rule that the receiving antenna must be "near or adjacent to" a CATV community.

In applying its rule, the court said that Denver TV station signals received and distributed to the Rawlins CATV subscribers and the Spokane signals received and distributed to Great Falls CATV subscribers and the Los Angeles signals received and distributed to Farmington subscribers were "presumptively" distant signals, although it remanded so that petitioners could attempt to carry the "heavy bur-

den" of proving that the signals were receivable in these communities under its rule.[53]

SUMMARY OF ARGUMENT

The Commission's plan to provide adequate television service to all communities of the United States is based on the expansion of CATV service and its integration into the national communications system. More than 600 communities now depend on reception of "distant" signals within the rule of the court below to secure what the Commission calls minimum television service. Many other communities without adequate television service cannot secure that service in the future except through reception of "distant signals" by CATV under the FCC rules.

CBS and the copyright proprietors have stated that they will grant licenses to CATV for "distant signal" reception only in places which they in their own self

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[53] The court expressly doubted that petitioners would carry the burden (JA xl; 476 F.2d at 353), and did not mention the stipulations of the parties that "television reception directly off-the-air by house-top antennas or tower-mounted antennas is not feasible" in Great Falls, Rawlins and Farmington from the Spokane, Denver and Los Angeles stations (JA 219, 234, 266-7).

The court addressed the issue of a license implied-in-law to protect the public's right to use the CATV antenna service in three footnotes (JA xxxviii-xlii, n. 18-20; 476 F.2d at 352-54, n. 18-20), holding that it need not reach the issue. In its decision in *Fortnightly*, 377 F.2d at 880-883, the court had stated that a license implied-in-law might apply only where the signals were receivable in the community on house-top antennas. In view of its ruling that the claims with respect to the Elmira and New York City CATV did not involve "distant signals," and that the Albuquerque signals were not distant because of the rebroadcasts of translators located near Farmington, the court stated that it had no occasion to consider whether their reception was also protected by a license implied-in-law.

interest regard as in a station's coverage area. The decision below puts into the hands of the copyright proprietor the power to use copyrights to deprive large segments of the public of minimum television service whenever it suits the copyright proprietor's economic interest.

1. Petitioners' systems function in the same way in the reception of distant signals as the CATV systems in *Fortnightly*. Petitioner's systems carry without editing the broadcasts they receive. They have no control over and have nothing to do with the selection of programs that are broadcast. The CATV systems operate on the viewer's side of the line with respect to all broadcast signals received whether "distant" or non-distant.

The court below accepted the copyright proprietor's assertion that it is contrary to his economic interest to have a market dilution for his works by CATV reception of distant signals. Based on that market concept the court developed a rule, premised on one antenna technology, which holds that use of a "transmittal device" such as microwave to provide the connection between the antenna and the cable system by which the signal is distributed to subscribers converted the CATV reception service into a performance resulting in infringement.

The same market dilution contention and comparable technological grounds for holding CATV reception to be a performance were rejected in *Fortnightly*.

The court below relied, erroneously we believe, on one sentence in this court's opinion in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 163 (1968), where this Court upheld the rules adopted by the F.C.C.

concerning the compulsory carriage and nonduplication protection of signals by CATV. The F.C.C. definition of "distant signal", the court below said, was "unsuitable for copyright purposes", and its use would "fly in the face of the mandate of *Fortnightly.*" Yet the court below constructed its own new definition of "distant signal" based on the particular antenna technology it approved. If a "transmittal" device such as cable or microwave were required to conduct the signal from the antenna, the court without explanation stated that the CATV was "functionally equivalent to a broadcaster." *Fortnightly* holds, we submit, that distance from the antenna, the particular technology or location of the antenna, and the technology of the "device" to connect the antenna with the cable distribution's system do not change the reception function into a broadcast function.

2. A. The copyright proprietor's market concept accepted by the court below disregards the fact that the F.C.C., pursuant to its statutory authority to fix "areas or zones to be served" by stations, had by its CATV rules put petitioner's subscribers in the coverage area of the "distant stations." The F.C.C. did this both by general rules and by specific authorizations in microwave licenses which granted authority for transmission of signals broadcast by the specific "distant stations" to petitioners' systems.

The F.C.C. rules represent a careful weighing in the public interest of the rights of the public to television service, the position of the broadcast stations and the interest of the copyright owners. The F.C.C. adopted CATV rules as the means of providing the public with adequate television service. At the same time it carefully limited the "distant signals" which could be re-

ceived in order to prevent adverse impact on stations. It also weighed and protected the interest of copyright owners through complicated and elaborate exclusivity rules.

If allowed to stand, the decision below will enable the copyright owner to supplant with his own private rules the F.C.C. CATV regulations based on the F.C.C.'s statutory authority to fix "areas and zones to be served" by stations.

B. The record demonstrates that petitioner's CATV subscribers are in the station's coverage area as a matter of television industry economics which are based on the size of the audience for a station or program. The prices advertisers pay, the rates networks pay to affiliates and the prices which program suppliers receive turn on the size of audience reached.

TV audiences are measured by rating services—A.R.B. and Neilsen—which use a sampling method to determine the number of viewers. CATV subscribers are measured and included in the audience attributed to a station, a network or a program. Advertisers, networks, stations and program suppliers all use the rating services. Stations advertise their coverage including CATV subscribers.

The close relationship between size of audience and advertising rates is shown by the action of the Cost of Living Council which adopted a special rule for TV because advertising rates are determined by audience size as shown by rating services rather than based on costs.

C. The rule of the court below is so vague as to be unworkable and threatens to inundate the CATV in-

dustry with litigation. Each of the words used by the court below in its definition of "distant signals" is imprecise and will be the subject of litigation.

The significance of the threat to the CATV industry is shown by the fact that if statutory minimum damages of $250 per infringement were levied, the potential damages for reception of one channel of "distant signals" could reach $2,000,000 per year. These anticompetitive effects can properly be weighed by the Court in determining whether the limited statutory copyright monopoly should be enlarged by judicial construction.

D. The decision below focuses on the supposed harm to the copyright owner and disregards the primary policy of the copyright act which is to assure release of the author's work to the public. *United States* v. *Paramount Pictures, Inc.* 334 U.S. 131, 158 (1948). A broadcast as a matter of law must be "intended to be received by the public." When a copyright owner receives a reward for release of a broadcast for public reception, then the secondary purpose of the copyright act of reward to the copyright proprietor is satisfied and the controlling principle should be the act's primary policy of making that particular release of the work available to the public. Allowing the copyright proprietor under the rule of the court below to select members of the public who are not to be permitted to receive the broadcast or who must pay a second royalty conflicts with the primary policy of the Copyright Act.

3. The decision below would frustrate the F.C.C. regulatory plan for CATV and is in direct conflict with one part of that scheme. The F.C.C. rules authorizing

reception of "distant signals" are an integral part of the F.C.C. plan to utilize CATV to provide television service to underserved areas. The decision below would let the copyright proprietor substitute his private control over the reception of "distant signals" when it suited his economic interest.

A basic aspect of the F.C.C. plan is the rule which requires a CATV system to receive certain television stations and to give those stations non-duplication protection. The reception of the Durango station by the Farmington CATV is required under that rule. Instead of judicially enlarging the limited copyright monopoly so as to create such a conflict, the statute should have been construed under the normal rules on statutory construction to avoid the conflict.

4. The release by the copyright owner of a particular embodiment of his work by licensing it for broadcast for public reception must be held to carry with it a license implied in law for the public to receive and enjoy that broadcast. The public's license cannot be restricted to a "do it yourself" basis, but must also protect its right to seek the aid of a CATV system under F.C.C. rules to enable it to receive the broadcast, without incurring or imposing copyright infringement liability. When a copyright proprietor exploits his work through broadcasting, he subjects his rights to the legal and economic structure of the industry and must be held as a matter of law to have licensed the public for whom the broadcast was intended, including members of the public who chose to receive through the aid of CATV.

ARGUMENT

Preliminary Statement

In January 1973 there were 3032 CATV systems serving more than 6,000 communities.[54] These CATV systems provide a reception service to 7.3 million homes out of a total of about 65 million TV homes.[55] There are an additional 1,645 communities where franchises have been granted but the systems were not yet operating as of January this year, and applications for franchises were pending in more than 1,000 communities.[56]

There has never been any reason to collect data as to which systems receive "distant signals" as that term was defined under the rule of the court below. It would appear that in 1972 at least 650 systems serving 2.3 million homes received some "distant signals."[57] A very large percentage of these systems are in states west of the Mississippi and in the South. Of these CATV systems about 50% are dependent on reception

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[54] *Television Factbook*, Services Volume, 1973-1974 Ed. pp. 84a, 379a. The *Television Factbook* is a standard reference for facts concerning the television industry and CATV. JA 178. It is widely used and relied upon by broadcasters, advertisers and others in the industry.

[55] *Television Factbook, supra* n. 54 pp. 84-a, 102-a.

[56] *Television Factbook, supra* n. 54 p. 379-a.

[57] These figures are based on an analysis of CATV systems, as reported in the *Television Factbook*, Services Volume, 1972-1973 Ed., which had microwave licensed by the F.C.C. and whose receiving antenna is therefore not "in", "near" or adjacent" to the CATV community. Since the number of systems in operation increased from 2,839 systems reported in the 1972-1973 *Television Factbook*, Services Volume, p. 363a, to 3,032 systems reported in the 1973-74 Edition Services Volume, p. 379a, the number of systems using microwave has undoubtedly increased.

of these distant signals to provide to their subscribers full network service (reception of a station affiliated with each network broadcasting the network programs). Since the rule of the court below is ambiguous and unclear as to where a receiving antenna outside the community could be located without infringing, or as to what particular level of sophistication of antenna technology is permitted (see discussion *infra* pp. 64-68), it is not possible to estimate how many additional CATV systems receive "distant signals" under the rule announced by the court below.

Without considering the question of economic viability, electronic interference prevents the Commission from making what it calls "minimum television service"[58]—three full network stations and one to three independent stations—available to all communities by authorizing additional television stations. The Commission has determined that the "public interest" will be served by authorizing cable systems to provide that minimum television service.[59]

Based on the Commission's survey of "significantly viewed signals" in its compulsory carriage rules, there are about 1,500 counties in the United States which cannot have "minimum television service"[60]

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[58] *Letter of Intent (Cable Television Proposals)*, 31 F.C.C. 2d 115, 120 (1971).

[59] The CATV rules authorize all CATV systems to receive three full network stations. The number of independent stations which may be received is dependent on the size of the television market in which the system is located. See discussion *Cable Television Report and Order, supra* n. 4, ¶ 89-96 at 177-80.

[60] The Commission's listing of "significantly viewed signals" (47 C.F.R., Part 76, App. B, pp. 448-529) shows 66 counties with one significantly viewed signal, 414 received two signals and 1,028 received three signals.

without CATV reception. It is clear that in addition to the 650 communities which in 1972 were dependent on CATV reception of "distant signals" to get minimum television service, there are many more communities which cannot reach the minimum service level without CATV.

CBS has stated that it is not seeking large damages in this action. Rather it intends to "assert its statutory rights" to prevent CATV reception which is not consistent with its conception of preserving "the present system of nationwide program distribution by television networks through their affiliated stations . . ." (JE 470). Thus, under the rule of the court below, it will be able to stop all CATV reception of "distant signals" outside what it conceives is in its own interest to be a station's coverage area. The Department of Justice has said that "the major television networks have an economic interest in the limited number of channels of access to the public which the present television system provides; and this general interest clearly conflicts with the large-scale development of CATV as a means of access to the viewing public."[61]

The F.C.C. in rejecting a proposal to amend its cross-ownership rules (which forbid a network to own CATV systems)[62] stated that "major broadcast television networks were already such dominant influences in the television field that any further expansion of their ownership or control into the new and grow-

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[61] *Comments of the U.S. Department of Justice before the Federal Communications Commission*, Docket No. 18397 at 21, n. 11 (1969) (investigation regarding ownership of CATV systems by broadcasters and other media).

[62] 47 C.F.R. § 76.501(a)(1).

ing cable television industry was per se undesirable . . . ."[48]

Even if copyright proprietors were willing to grant licenses to CATV, there is no mechanism by which the CATV operators could effectively negotiate with the numerous copyright proprietors for copyright licenses. The CATV operator does not know or control in any way the programs selected by a broadcaster, whether the station is "distant" or nondistant. He has no way of knowing whom he should ask for a license. Moreover, one program may involve several licenses (both for the program and the music). Certainly in any one day there would be a multitude of copyrights involved in a station's broadcast. Since there are no compulsory licenses, the CATV service would depend on the CATV reaching all proprietors and getting acceptable terms from all. One recalcitrant copyright proprietor could so interrupt the CATV service as in practice to make CATV not attractive to the public and hence not viable. If the refusing proprietor were a copyright owner like CBS or a movie company with thousands of copyrights, there would be no prospect of viable CATV operations.

The decision of the court below would put into the hands of the copyright proprietor the power whenever it suits his own self interest to deprive the public in underserved areas of the opportunity of using CATV to receive full television service now enjoyed only by those living in larger metropolitan area.

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[48] *Memorandum Order and Opinion on Cable Television Services*, 39 F.C.C. 2d 377, ¶ 41, at 392 (1973).

I. The Decision Below, by a Novel Interpretation Based on the Selection of One Antenna Technology, Has Constructed a Rule Enlarging the Copyright Monopoly in Disregard of the Holding in Fortnightly.

The central issue, as both courts below recognized, is whether the reception of television signals by petitioners' CATVs and their distribution to subscribers constituted a "performance" "in public" of the broadcast program. *Fortnightly* held (392 U.S. 400-401):

> "The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry" (footnotes omitted).

In reaching this conclusion this Court rejected the reasoning of the *Fortnightly* district court which relied on the particular technology of the CATV equipment (392 U.S. at 399, n. 27). It also rejected the reasoning of the court of appeals that CATV reception should be held to be performance because "a fundamental purpose of the exclusive right of public performance" was "to protect copyright proprietors against dilution of the market for their works"—and that the CATV reception "harms the copyright holder." (377 F.2d at 878).

Petitioners' CATV systems meet all of the criteria set forth by this Court in *Fortnightly*.

There is no dispute that the petitioners' systems are not engaged in broadcasting or rebroadcasting; both the district court (JA 122-139; 355 F.Supp. at 624-30) and the court below agree (JA xx; 476 F.2d at 343). Petitioners' systems do not select the programs to be broadcast. Except as may be required by F.C.C. rules, petitioners' CATV systems carry, without editing, whatever broadcasts they receive.

The court below adopted a market-dilution analysis of copyright, and a holding based on antenna technology, which we submit are contrary to the holding in *Fortnightly*.

In *Fortnightly* the court of appeals had held that because the broadcasts could not be received on housetop antennas, the reception by the CATVs was outside the station's area, diluted the copyright owner's market, and therefore should be held to be a "performance." 377 F.2d at 878.[64] This court rejected the court of appeals copyright market-dilution reasoning in *Fortnightly*. The court below's similar reasoning should also be rejected.

The technological reasoning of the court below appears to be that where the receiving antenna was not located "in" or "near" the CATV community and a

[64] A modification of the "market dilution" argument was made by the Solicitor General in *Fortnightly*, who accepted the copyright owner's argument that all CATV reception was a performance but proposed a "compromise solution" based upon a license implied-in-law when the CATV system was within the Grade B contour of a station on the ground that in the economics of the television industry both the station and the copyright proprietor benefit from that coverage but not coverage outside the Grade B contour. See 392 U.S. at 401; *Memorandum for the United States as Amicus Curiae* at 10, *Fortnightly Corp.* v. *United Artists Television, Inc.*, *supra*.

"transmittal device" was needed to bring the received broadcast signal to the community (JA xxxvii; 476 F.2d at 351), the CATV is acting like a broadcaster when it receives a "distant signal" and therefore "performs" the program. The fact that a transmittal device was needed by the CATV for the connection from the antenna was decisive and both cable and microwave (which the court found were alternates for point-to-point transmission) were such devices. (JA xxxi-xxxii; 476 F.2d at 349). But a transmittal device—cable and amplifiers—was used in *Fortnightly* to connect the antenna to the CATV's distribution system, and the *Fortnightly* district court found that the stations could not be received on housetop antennas in the CATV communities. There were separate franchises issued by five separate incorporated towns to the Clarksburg CATV,[65] each of which was a "CATV community" under the rule of the court below. A single antenna was used by the CATV for all five communities. This Court did not comment on the different relationships between the antenna and the five communities, or that a "transmittal device" (in *Fortnightly*, cable and amplifiers) was needed to bring the signals to the communities because housetop antenna reception was not possible. See 377 F.2d at 883 nn. 13, 14.

This Court in *Fortnightly* rejected the market and technological contentions, renewed here by respondents. It pointed out that "petitioner's systems did not 'perform' the respondent's copyrighted works in any conventional sense of the term, or in any manner envis-

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[65] See Joint Appendix (JA 206) and Joint Exhibit volumes (JE 1-96) in *Fortnightly Corp.* v. *United States*, *supra*.

aged by the Congress that enacted the law in 1909."[68] The same analysis this Court made concerning the *Fortnightly* CATVs is applicable here. Petitioners' CATVs provide an antenna and an efficient connection to the viewer's set. The fact that they have a better located antenna or a more efficient connection between the antenna and the set should, as the district court said, make no difference. If there was no ground in *Fortnightly* for concluding that the copyright monopoly should be expanded by judicial interpretation of the word "performance" to enable the copyright owner to use his statutory monopoly to draw lines around the market of a television station to suit his convenience, then none exists here. Neither technological arguments nor copyright owners' market concepts provide any basis for judicial enlargement of the copyright monopoly or the construction of an exception to *Fortnightly*.

A. The antenna technology relied on by the court below.

The court below concluded that the *Fortnightly* holding applied only when the signals being received by the CATV system were "already in the community and were not imported by the CATV system from another community . . ." (JA xxxii; 476 F.2d at 349). While it recognized that in *Fortnightly* the CATV system "distributed the programs to an audience to which they would not have otherwise been presented" (JA xxxiii; 476 F.2d at 349), the court then interpreted *Fortnightly* to mean that a CATV system can provide an antenna

[68] 392 U.S. at 395 (footnotes omitted). The Court in footnote 14 cited *White-Smith Music Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), where the Court held that the words of the Copyright Act are to be interpreted in their "ordinary sense", *id.* at 16, "common understanding" *id.* at 17 and "ordinary signification" *id.* at 12—the sense in which they are "generally understood" *id.* at 17.

service to receive programs which a homeowner could receive "using any available antenna" (JA xxxiv; 476 F.2d at 350). Where, however, in order to receive the program a microwave link or other "transmittal device" is needed to provide the connection between the antenna and the system, the system is no longer using "improved antenna technology" but is engaged in "importation of the signal into the CATV community from a separate, distant community" (JA xxiv; 476 F.2d at 350). Without further elaboration or explanation the court went on to hold that where a CATV receives signals beyond the range of "local antennas," it is "functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed to subscribers on these imported signals." (JA xxxiii; 476 F.2d at 349).

The rule as articulated by the court below turned on antenna technology which it acknowledged was "in a constant state of flux." (JA xxxv; 476 F.2d at 350). It went on to elaborate its definition of "distant signals" whose reception would be infringing—if the broadcast can be received on an antenna located "in," "near" or "adjacent" to the CATV community, the signal is "in" the community and its reception is permissible (i.e., not a "performance" by the CATV); if for any reason the antenna was located away from the community, then reception of the signal constitutes a "performance" unless the CATV bears the "heavy burden" of showing that the broadcast could have been received on "substantially similar receving equipment" of "substantially similar sophistication" at a location in or adjacent to the CATV community without "a relay or retransmittal device (such as microwave, cable, satellite, or the like) . . . ." (JA xxxvi; 476 F.2d at 351).

The court's rule turned completely on one antenna technology as permissible under the copyright law, an antenna which is mounted in or near the community. If it is necessary to use a "retransmittal" device—including cable, or microwave authorized by the F.C.C.—the reception is converted into, or "deemed" (JA xxxiii; 476 F.2d at 349), a performance. The court nowhere explains why the CATV's use of a "retransmittal device" has copyright significance, and the court completely overlooks the fact that every antenna, even one which is in or near the CATV community, must have a cable or other "retransmittal device" connecting the antenna to the CATV distribution system.[67]

B. The decision below is based on a misinterpretation of Southwestern.

In reaching the conclusion that reception of "distant signals" converts the reception function of a CATV into a broadcast function and hence a performance, the court relied critically on one sentence in *United States* v. *Southwestern Cable Co.,* (392 U.S. at 163):

> "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of stations entirely beyond the range of local antennae."

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[67] The copyright owner in *Fortnightly* had made an extensive argument, rejected by this Court, that the CATV's use of amplifiers with its cable lines constituted a "transmission" of the signals and therefore a "performance." The "retransmittal device" analysis of the court below finds "performance" by reason of the equipment used, thereby attempting to reach the same result as the "transmission" argument made by the copyright proprietor in *Fortnightly.*

Southwestern involved no copyright issue, and we submit the court below erred in assuming the discussion in *Southwestern* in any way related to the issue as to the function of a CATV system from the copyright point of view as determined by *Fortnightly*. In *Southwestern* the issue was the jurisdiction of the Commission to issue rules establishing station priorities under which CATV systems are required to receive and give non-duplication protection to stations within whose Grade B contour the system was located. The compulsory carriage rule applied to "local" stations based on the Grade B contour rule then in effect and did not apply to "distant stations"—beyond the Grade B contour. In a footnote to the sentence in the *Southwestern* opinion relied upon by the court below but not mentioned by the court, this Court said (392 U.S. at 163, n. 16):

> "The term 'distant signal' has been given a specialized definition by the Commission, as a signal 'which is extended or received beyond the Grade B contour of that station' 47 CFR § 74.1101 (i). The Grade B contour is a line along which good reception may be expected 90% of the time at 50% of the locations. See 47 CFR § 73.683(a)."

The court below did not refer to this footnote when it relied on the reference to "distant signals" in *Southwestern*. *Fortnightly* and *Southwestern* were argued together and decided at virtually the same time. When read together, we submit that a reference to "function" in connection with F.C.C. regulations on compulsory carriage has no copyright significance as far as a reception service is concerned, and provides no basis for the artificial rule of the court below on antenna location and technology.

In *Fortnightly* five out of the ten stations received by the two systems were "distant signals" under the F.C.C. compulsory carriage rule upheld in *Southwestern.*[68] Since *Southwestern* and *Fortnightly* were under consideration together and decided only a few days apart, it is difficult to believe that if the "distant signal" definition by the F.C.C. had any copyright significance, this Court would not have so stated. Indeed the court below—which had noted in *Fortnightly* that 5 of the stations received were beyond the Grade B contour (377 F.2d at 883)—rejected the F.C.C. Grade B definition of a reception area in its *Fortnightly* decision because it was based on an engineering calculation concerning expected reception and "was a mere theoretical estimate calculated without regard to" actual reception. 377 F.2d 883-84, n. 14. The court below said that the Grade B contour as a definition of "distant signals" was "unsuitable for copyright purposes," because "any definition phrased in terms of what can be received in area homes using rooftop antennas would fly in the face of the mandate of *Fortnightly.*" (JA xxxv; 476 F.2d at 350).

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[68] Since *Southwestern* the F.C.C. has for regulatory reasons modified the compulsory carriage requirements. See discussion *supra,* pp. 10-11, and n. 15.

Under the present rules the compulsory carriage criteria vary with the television market as defined by the F.C.C. Compulsory carriage is applicable within a zone 35 miles from a television station, that zone being defined as a "television market" for this purpose (47 C.F.R. §§ 76.59, 76.61), within the Grade B contour if the CATV is outside a television market (47 C.F.R. § 76.57), and if the signal is "significantly viewed" (47 C.F.R. § 76.54). Under these criteria four of the signals received by the *Fortnightly* CATVs would be "distant signals". WTAE Pittsburgh is "significantly viewed" in Harrison County and is therefore no longer "distant" in Clarksburg. (47 C.F.R., Part 76, App. B, p. 526).

Despite the fact that the court below recognized that the regulatory definition of distant signals referred to in *Southwestern* was "unsuitable for copyright purposes," it nowhere explained how this court's comment in the regulatory context could form the basis for construction of a new judicial rule "deeming" reception a "performance" based on antenna technology or the devices used to connect the antenna to the CATV distribution system.

C. Reception of "distant signals" is not analogous to broadcasting.

Having constructed a judicial definition of "distant signal," which the court below acknowledged was imprecise, it provided no analysis or reasons why the function of receiving and distributing these "distant signals" made the reception service "functionally equivalent to a broadcaster." Nowhere does the court make any analysis of the function of a broadcaster to show that the operations of a CATV system are like a broadcaster when it receives "distant signals" but are not like a broadcaster otherwise. In both cases—distant signal reception and nondistant signal reception—the CATV operation is exactly the same. The court acknowledged that the CATV is not a broadcaster or rebroadcaster (JA xx; 476 F.2d at 343). The CATV has no more control over selection of programs in one case than it does in the other. In both cases the signals are received off-the-air and made available simultaneously without editing to subscribers. Nor is there any difference in the fact that there is a "transmittal device" (microwave or cable) between the antenna and the CATV distribution system. The antennas in *Fortnightly* and indeed every antenna must have a connecting "transmittal device." Sometimes it is cable and sometimes it is microwave. But it should make no

difference which connecting device is used, for, as the district court found, a "microwave is thus completely analogous to the use of cable as a connecting carrier" (JA 125; 355 F.Supp. at 625), a finding the court below affirmed (JA xxxi-xxxii; 476 F.2d at 348-49).

The inconsistencies in the rule constructed by the court below are demonstrated by its statement of its holding:

> "We hold that when a CATV system imports distant signals it is no longer within the ambit of the *Fortnightly* doctrine, and there is then no reason to treat it differently from any other person who, without license, *displays* a copyrighted work to an audience who would not otherwise receive it." (Emphasis supplied.)

The court nowhere explains what it means by the statement that the CATV system "displays" a program where a "distant signal" is involved, but does not otherwise display a broadcast program. Petitioner's systems, like those in *Fortnightly,* handle only electromagnetic energy, i.e., the broadcast signals. No sights or sounds of the programs are involved in any way, whether "distant" or nondistant signals are received. If there is any "display" or either "distant" or nondistant signals it is by the homeowner when he turns on his own set. And it is stipulated that the homeowner does not infringe.

In addition to *Southwestern* the court below referred to one other case—*Select Theatres Corp.* v. *Ronzoni Macaroni Co.,* 59 U.S.P.Q. 288 (S.D.N.Y. 1943), noting that the case was cited in *Fortnightly* for the proposition that "broadcasters perform." 392 U.S. at 398, n. 23 (JA xxxiii; 476 F.2d at 349). The court below suggested no other significance to the *Select*

Theatres case, and we submit it has none for this case. *Select Theatres* involved the question whether a broadcaster performed a program which was "piped" to the station over telephone lines and then broadcast. A broadcaster is responsible for selection of programs and whether he procures them via telephone wire from a remote source or from some other source is irrelevant. When he broadcasts the program he performs. Petitioner's CATV systems carried out none of these functions of a broadcaster with respect to any broadcast signals received and made available to subscribers, whether "distant" or not.

Fortnightly teaches, we submit, that CATV reception of signals broadcast for reception by the public and distribution of those signals to subscribing members of the public is not a "performance"; the CATV acts in aid of reception and is "on the viewer's side of the line." Distance from the broadcast station, the location of the receiving antenna, and the nature of the "transmittal device" connecting the antenna to the CATV distribution system does not change the reception function into a broadcast function.

II. The Decision Below Creates an Uncertain Rule Which Displaces the F.C.C.'s Statutory Authority, Disregards the Record as to CATV's Place in Television Economics, Has Anti-Competitive Consequences, and Is Contrary to the Primary Policy of the Copyright Act.

The court below, relying on assertions of respondents and other copyright owners in their briefs, and in disregard of the evidence in the record, concluded that, when a CATV system "imports" a distant signal, it brings a program to a different market, thereby allegedly diminishing the copyright owner's ability to secure income by licensing in the market where the

program is imported. (JA xviii n. 2; 476 F.2d at 342, n. 2). Respondents and other copyright owners, whose assertions the court accepted, contend that the market of a television station is marked by the area where roof-top reception is possible. The court below accepted these market contentions but could not accept their criteria of "distant signals." To rely on rooftop antenna reception, the court recognized, would "fly in the face of the mandate of *Fortnightly*." JA xxxv; 476 F.2d at 350. It attempted, however, to save the market concept it had espoused in *Fortnightly* (377 F.2d 878, 882-83) by its novel and complicated definition of "distant signal." It thus preserved the copyright owner's notion of market definition, although it recognized that "distant signals" were not a function of actual distance from the broadcasting station. Thus the court held that the reception by the Elmira CATV system of stations 46 to 119 miles away (JA xxxix; 476 F.2d at 352) was not "distant," although reception of Durango in Farmington (43 miles) was "distant" under its rule. These "market" contentions overlook the fact that the F.C.C. has included petitioners' CATV subscribers in the "distant" stations coverage areas.

A. The F.C.C. pursuant to its authority under the Communications Act to establish areas or zones to be served by television stations has included petitioners' CATV subscribers in the coverage area of the "distant stations".

The F.C.C. is authorized by the Communications Act to determine the location of stations and to fix the "areas or zones to be served by any station" (47 U.S.C. §§ 303(d) and (h)). Respondents' arguments are based on one aspect of the F.C.C.'s authority—to fix the location and power of a TV station. Respon-

dents and the court below overlook the fact that in two ways, one general and one specific, the Commission has acted so as to include petitioners' CATV subscribers in the "areas or zones to be served" by the stations which are "distant stations" under the rule of the court below. The inclusion of these viewers is authorized by the general CATV regulations authorizing the reception of "distant signals." But the Commission has acted in a more specific way to include the subscribers of the three systems in the "areas or zones to be served" by the stations which broadcast the signals held to be "distant." In all three instances, the CATV systems used a microwave link to connect the receiving antenna located outside the community to the CATV cable distribution system in the community. Each microwave link was licensed by the F.C.C. for the specific purpose of transmitting that "distant signal" to the CATV for distribution to subscribing members of the public.

Microwave is point-to-point transmission of radio waves through the air and all uses of microwave are subject to F.C.C. regulation and license. See discussion of microwave, *supra,* pp. 15-17. The court below affirmed the finding of the district court that microwave is not broadcasting but is point-to-point communication which is "merely an alternative, more economical in some circumstances, to cable . . ." and held that it attached no "legal significance, in terms of coypright liability, to the decision to utilize microwave links." JA xxxii; 476 F.2d at 349. The court went on to hold, however, that if a "transmittal device"—"microwave, cable, satellite or the like"—is necessary for the reception of the signal, and it cannot be received

on an antenna in or near the CATV community, it is not "in the community" and becomes a distant signal.

This reasoning overlooks the fact that the signal is "in the community" because of the specific action of the Commission in granting microwave licenses to bring the signal to the community. All applications for microwave with respect to CATV use must state the stations to be received, the equipment to be used and the CATV system to which the signals are to be transmitted where the signals are distributed to the public, including the current number of subscribers to the system. (47 C.F.R. § 78.15 and §§ 21.700 *et seq.*) The microwave licenses for Farmington authorized transmission of the signals received from the Durango and the Los Angeles stations to the identified Farmington CATV for distribution to its subscribers; similarly the F.C.C. licensed the use of microwave in connection with the reception of the Spokane stations in Great Falls and the Denver stations in Rawlins. JA 159-60; JE 359-72, 386-88. When the Commission issued these licenses, it was exercising its authority to determine that the "areas or zones to be served" by the stations included the community where petitioners' CATV system was located.

The Commission has made clear that in determining what local or distant signals a CATV will be permitted to carry, "the test was the general public interest standard of the Communications Act . . ."[69] This is in conformity with what this Court's statement that "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943).

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[69] *Cable Television Report and Order, supra* n. 4, ¶ 13, at 148.

The television-station allocation policy adopted in 1952[70], as the Commission pointed out, reflects population distribution; more channels are allocated to densely populated areas than to those that are sparsely populated.[71] Two reasons underlie this determination: electrical interference prevents multiplication of stations, and more stations can be supported in areas of greatest population. As the Commission noted:

> "This represents, however, not a judgment that inhabitants of the largest cities need the added service or have the public right to more diversity, but merely our decision as to an equitable distribution of facilities. . . . Clearly, cable service can provide greater diversity—can, if permitted, provide the full television complement of a New York or a Los Angeles to all areas of the country. Although that would be a desirable achievement, it would pose a threat to broadcast television's ability to perform the obligations required in our system of television service. We believe, however, that those who are not accommodated as are New York or Los Angeles viewers should be entitled to the degree of choice that will afford them a substantial amount of diversity and the public services rendered by local station."[72]

CATV was regarded as the means of achieving the diversifications objectives of the allocations policies[73] and providing what the Commission called "minimum television service"[74]—three full network stations and

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[70] *Sixth Report and Order, Television Allocations*, 17 Fed. Reg. 3905, 1 (part 3) Pike & Fischer R.R. 91:601 (1952).

[71] *Cable Television Report and Order, supra* n. 4, ¶ 88, at 176-77.

[72] *Id*

[73] *Ibid.*, ¶ 89, at 177

[74] *Letter of Intent* (*Cable Television Proposals*), *supra* n. 58.

at least one independent—to underserved communities through CATV reception. The F.C.C. survey of "significantly viewed signals" shows that there are 1,500 counties in the United States which are underserved and no not have minimum television service. [75]

As part of this carefully constructed and interrelated plan, the Commission deliberately brought the communities served by cable within the range of the television stations broadcasting the "distant signals". The granting of microwave licenses to permit petitioners' CATV systems to receive what the court below called "distant signals" was a specific application of the general policy putting the CATV communities in the "areas or zones to be served" by the "distant" stations.

The Commission's CATV rules also involved a careful weighing of the interests of copyright owners. The court below justified its rule on the ground that the "importation" of "distant signals" reduced the fee which the copyright owner could get for licenses to broadcasters intended by the copyright owner to serve the CATV community "to the injury of the copyright holder". JA xviii, n. 2; 476 F.2d at 342, n. 2. This was a repetition of the rationale of that court in *Fortnightly,* rejected by this Court, of protecting "copyright proprietors against dilution of the market for their works." 377 F.2d at 878. Two points should be made with regard to this reasoning. First, the contention was rejected by this Court

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[75] *Memorandum Opinion and Order on Reconsideration, supra* n. 5, App. B, at 378 *et seq.* Of the counties listed 66 had one significantly viewed signal, 414 had two signals and 1,028 had three signals.

in *Fortnightly*. Second, the F.C.C. has addressed the issue directly and its rules represent a balanced concern for the public's right to view and the copyright owner's interest. As the Commission has pointed out, under the rules distant signal reception, particularly into small markets, is "severely limited."[76] Moreover, the Commission adopted rules designed to protect exclusivity of both stations and copyright owners. Beginning in 1965 it adopted a compulsory-carriage and nonduplication rule which required the CATV to block out the reception of the same program from a more distant lower priority station.[77] The Commission has referred to this rule as providing simultaneous exclusivity. It has since applied the exclusivity to same day reception. In addition, the Commission has adopted rules which provide for exclusivity for syndicated programs for periods as long as a year. The Commission explained its balanced decision by stating:

> "The rules in this area are designed to permit copyright holders to distribute programming in particular markets either by broadcast alone or, if they wish, by both broadcast and through cable distant signal carriage".[78]

The decision of the court below clears the way for the copyright holder to supplant the carefully balanced F.C.C. plan and to use his copyright to draw exclusive territorial lines around stations whenever he concludes that it is in his economic interest to prevent reception

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[76] *Memorandum Opinion and Order on Reconsideration, supra* n. 5, ¶ 39, at 341.

[77] See n. 15 *supra*.

[78] *Memorandum Opinion and Order on Reconsideration, supra* n. 5, ¶ 41, at 342.

of a "distant signal". CBS has asserted that reception beyond which it calls the "normal reception" area interferes with its exploitation of copyrights. In addition, there are an estimated 150 copyrighted materials in each week of a television station's broadcast. Even assuming that CBS should change its policy and permit reception of distant signals, one or more of the other owners could decide to cut off reception or so interrupt reception as to destroy the CATV service. The power of the F.C.C. to fix "areas and zones to be served" would be supplanted by the authority of the copyright owner to erect his own "zones or areas to be served". Members of the public who are now dependent on CATV reception of distant signals for "minimum television service," and in those areas that do not now have "minimum television service," will be deprived of the "maximum benefits" which it was the "avowed aim" of the Communciations Act to secure for them. *National Broadcasting Co.* v. *United States, supra.*

B. The rule of the court below disregards the evidence that petitioners' CATV viewers are in the coverage area of the distant stations as a matter of industry economics.

The court below (JA xviii, n. 2; 476 F.2d at 342) accepted the assertions of respondents and *amici* as to television station economics and disregarded the undisputed evidence that CATV subscribers are in the station's coverage area as a matter of television industry economics.

The economics of the television industry are directly related to the size of the audience reached by the broadcast (see discussion, *supra,* pp. 17-21). The prices charged advertisers for time, the rates paid to affiliates

by the network, the selection of network affiliates, and the prices which program suppliers get for their product, turn on audience reached. The audience size figures so prominently in the industry economics that it is common for both stations in soliciting advertisers and advertisers in selecting stations to use a cost-per-thousand calculation.[79]

The size of the audience on which these calculations and negotiations depend is determined in the television industry by the use of the rating services. The two major rating services, American Research Bureau ("ARB") and Nielsen, use a sampling system to measure the audience.[80] Each of the rating services include CATV subscribers in the sampling system so that CATV subscribers are surveyed as part of and included in the audience ratings. By this means, CATV viewers are attributed to and included in the station's or networks' audience.[81] As ARB states, its "objective is to present audience results in a form which will correspond to the manner in which television time is bought and sold." JE 422. Nielsen describes its users as advertisers, agencies, networks and network salesmen, and artists and program producers. JE 501.

The results of the surveys are included in monthly surveys by ARB and biweekly surveys by Nielsen.

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[79] JA 309-10, 389-390. To arrive at a cost-per-thousand, the network or station rate is divided into the size of the audience.

[80] See discussion, *supra*, pp. 17-18.

[81] See supra, p. 19.

Coverage maps and tables based on ARB surveys are published in the *Television Factbook,* a standard industry reference volume published each year. The rating services included the subscribers to petitioners' CATV in the audience of stations which the court below held to be "distant."[82]

The record shows that the stations exploit the fact that their audience includes CATV viewers. Maps prepared by stations or their representatives showed both the location of specific CATV systems in their "sales area" and the counties covered by the station (including the CATV communities). JE 459-464, 540. Brochures referred specifically to the number of CATV homes in the "coverage" of stations. JE 459-68, 540. See also JA 308-09, 388-89, 510-511, 513. CATV coverage was referred to in *TV Guide* (JE 472). As early as 1962, Spokane stations wrote the Great Falls CATV and there was correspondence over the years between stations and the CATV.[83] JE 494-499. In 1965, the CBS affiliate in Spokane regarded some 40,000 CATV subscribers, including Montana CATVs, as included in its coverage area. JA 385, 370-71. KREM-TV of Spokane advertised in the Great Falls newspaper. JE 389.[84] KHJ-TV, a Los Angeles independent carried on the Farmington CATV, published a "merchandising newsletter" (JE 357) in which it referred to CATV coverage of 291,949 homes on 99 CATV systems located in California, Arizona

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[82] See *supra,* n. 34.

[83] See also JE 347-58, 382-85, 389; JA 526-27.

[84] Other examples of station ads appear at JE 347-56, 382-85.

and New Mexico. JE 358.[85] The stations obviously regarded their CATV coverage as important.[86]

ARB ratings are a key element in the selection of network affiliates and the rates the network will pay them. Mr. Aubrey, then President of CBS, set out the general formula used by CBS in which ARB reports are used for both share of audience and number of television homes reached. JE 520-522. Included in the record are examples of CBS memoranda showing the operation of the rate formula and the use of ARB reports in connection with stations' request for increase in network rates. JE 282-290. As Mr. Jenks, CBS Vice President, testified, the CBS "affiliate desires to emphasize every possible coverage aspect in order to attract the network and argue for higher rates"; ARB reports are "one means used for that purpose". JA 308.

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[85] To underline the importance of the CATV coverage to a Los Angeles independent station the newsletter stated:

> " 'CATV is added reach for Los Angeles TV indies especially, since they are not affected by network protection clause.' " JE 358.

[86] KGGM-TV (Albuquerque) said (JE 467):

> "There are over 26,000 TV homes connected to CATV Systems carrying Albuquerque Television. This important audience is a vital one for KGGM-TV and is responsible for the continuing expansion of the Albuquerque Television Market."

WDAU-TV (a station in Scranton, Pa. whose signals were received on the Elmira CATV) had a CATV liaison employee (JE 374); it published pictures of CATV systems, including the Elmira CATV, in its monthly Review (JE 374, 376, 378), and advertised "At WDAU-TV, we're proud of CATV coverage greater than any station . . . anywhere." JE 379; see also JE 380-381.

Two witnesses who produced programs for networks and for syndication testified that ratings were important in subsequent licensing and that they wanted the highest ratings. Both used Nielsen for that purpose.[87]

The intricate and direct relationship between the size of audience and rates charged by television stations is confirmed by the decision of the Cost of Living Council applying a special rule under Phase IV to broadcasting. The basis for the Council's determination was its finding:

> "As a general industry practice, advertising prices are determined according to size of audience indicated by independent audience surveys."[88]

The Council went on to approve a "base rate" expressed "in terms of dollars per thousand listeners or viewers or households (referred to as 'cost per thousand' or 'CPM')"[89] This same base rate calculation based on audience size as determined by an independent rating service is to be used for charges for advertising spots or programs.

The decision of the Cost of Living Council continued earlier exemptions granted from price controls. Thus the Price Commission said that:

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[87] See *supra*, p. 20.

[88] 38 Fed. Reg. 27933 (October 10, 1973). See discussion *supra*, pp. 20-21.

[89] *Id.* The court below disregarded the general industry practice when it asserted that regional or local advertisers were not willing to pay more for "distant" audiences (JA xviii, n. 2; 476 F.2d at 342, n. 2). Obviously, an advertiser will pick a station, time or program which best meets his needs. He may want to reach women, or juveniles, or a particular area. But he must compete with others for advertising time and rates are based on total audience, not just the segment he wants to reach.

"In general practice, most firms have used the cost per thousand (CPM) concept in audience size to determine their advertising fees."[90]

The Cost of Living Council has recognized also that the marketing of movies and shows for TV is based on audience size. It granted an exemption from price controls because pricing in the industry is based upon "anticipated and actual public response" rather than cost of production.[91]

The F.C.C. has made clear that these industry economics were taken into account in the formulation of their CATV rules. It used ARB rating services in measuring viewing levels of stations, pointing out that the data used was that "commonly used by advertisers and broadcasters . . ."[92] In weighing the relationship between cable and the broadcasting stations, the Commission recognized that "advertisers purchase *total* audience" (emphasis in the original).[93] It contemplated the "general participation by broadcast television stations in the benefits of cable carriage."[94] Carriage of a station under the distant signal rules on a regular basis offers "a more saleable commodity to advertisers . . . ."[95] Indeed the Commission recognized

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[90] 37 Fed. Reg. 13659 (July 12, 1972). See discussion *supra*, n. 36.

[91] See n. 37 *supra*.

[92] *Memorandum Opinion and Order on Reconsideration, supra* n. 5, ¶ 53, at 346. In its final rules on "significantly viewed signals", a special ARB study was prepared excluding CATV subscribers, See n. 33 *supra*.

[93] *Id.*, ¶ 46, at 344.

[94] *Cable Television Report and Order, supra* n. 4, ¶ 92, at 179.

[95] *Memorandum Opinion and Order on Reconsideration, supra* n. 5, ¶ 15, at 332.

that it may be appropriate for a broadcaster to pay a "consideration" in order to be carried on cable and suggested that an appropriate consideration would be payment of microwave costs.[96] The Commission reached these conclusions after an economic review which included nine significant elements[97] and concluded that its distant signal regulations constituted a proper balancing of the interests of stations, cable and the public.

The F.C.C. in other contexts has recognized the direct relationship between audience and rates paid to stations. In 1970, when the F.C.C. was considering regulations regarding carrage by independent stations of network programs not "cleared" (i.e. accepted for broadcast) by affiliates, the Commission referred to network comments that the rate paid to independent stations was proportionate to the audience of the independent as compared to the affiliate.[98] After referring to network comments showing that independents were paid on the basis of their audience compared to that of affiliates and that CBS used ARB and NBC used Nielsen in this connection,[99] the F.C.C. concluded that it,

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[96] *Id.*, ¶ 20, at 334.

[97] *Id.*, ¶ 47, at 344.

[98] *Report and Order on Television Network Programs*, 26 F.C.C. 2d 772 (1970).

[99] *Id.*, ¶¶ 24-26, at 782. The F.C.C. summarized CBS' comments comparing rates paid to a VHF affiliate with that paid a UHF station in Washington, D. C. as follows:

> "It was stated that the rates for both were established on the same general basis, average quarter-hour homes delivered during prime time according to the latest ARB survey." *Id.*, ¶25, at 782.

See F.C.C. summary of ABC and NBC comments, *id.*, ¶24, at 782 and ¶26, at 782.

believed an independent "should receive no less than compensation, relative to that paid the affiliate, proportionate to the audience delivered by the stations." [100]

Respondents and copyright owners in the court below spoke of the advantages to a copyright owner to have a restricted market for a television station. But it is clear that a television station has the opposite interest and claims the largest coverage possible, including the CATV audience. That CBS' copyright position favors the network rather than individual stations is shown by the comment of the Los Angeles station referring to the importance of its CATV audience in California, Nevada and New Mexico, to an independent station since it is not affected by "network protection clauses. . ." (JE 358). Some comments to the Commission referred to the possibility that through CATV reception independent stations may become "super-stations" and that, contrary to the view of the court below, spot advertising would flow to such independents.[101] The Commission recognized these possibilities, which were taken care of by its "leapfrogging" and other rules to achieve an "appropriate balance," all within industry economics which include cable subscribers in a station's coverage.[102]

The court below disregarded the evidence in the record that the size of audience is a key element in

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[100] *Id.*, ¶33, at 785. While the Commission decided it was not necessary to issue rules, it announced its intention to watch the situation and to require reports from the networks on uncleared programs and other related matters. *Id.*, ¶¶59-60, at 795-96.

[101] *Memorandum Opinion and Order on Reconsideration, supra* n. 5, ¶ 24, at 335

[102] *Id.*

station rates. Its assumption that the amount a station may be willing to pay a copyright owner is tied to what an advertiser will be charged ignores the fact that what an advertiser will pay is determined by the audience the broadcast reaches. Moreover, once an advertiser has paid, he wants to reach the largest audience possible (JA 301).

The CATV subscribers in the audience are known to all in the industry—stations, networks, advertisers and copyright owners. The coveage data is widely published and used. The court below (without discussing these facts) accepted respondent's and the *amici's* self-serving arguments on "copyright market" (JA xviii, n. 2; 476 F.2d at 342, n. 2) as a basis for holding that the reception of a "distant signal" was converted into a performance in disregard of the fact that in industry economics the subscribers of the CATV which received the distant signal were in the "distant" station's coverage area.

C. The uncertainty of the rule of the court below and its anti-competitive consequences.

The court below acknowledged that "a precise judicial definition of a distant signal is not possible" (JA xxxv; 476 F.2d at 350). It went on to fashion a rule which is so vague and imprecise that it threatens to inundate the CATV industry with litigation.

Without explanation as to the legal justification, it transfers the burden of proof to the CATV system. The court established a "presumption" that any signal received by a CATV system is a "distant signal" if the antenna on which the signal is received is not located "in", "near", or "adjacent to" the CATV community *unless* the CATV can prove to the contrary.

There is, the court said, a "strong presumption" if the signal is initially received on an antenna near the TV station or between the CATV community and the TV station, and is then transmitted by a "relay or retransmittal device" such as "microwave or cable". In that case the CATV would be under a "heavy burden" to show that the signal "would be equally receivable off-the-air in the first instance and would project an image of similar quality, if there were substantially similar receiving equipment located in or adjacent to the CATV community" (JA xxxvii; 476 F.2d at 351).

The initial uncertainty is what the court meant by an antenna "near" or "adjacent to" the CATV community. It does not mean "in" for it says that "the distances we envision are small" and any CATV locating its antenna "more than a few miles" from the CATV community must bear the "heavy burden" of showing the signals received are not "distant" (JA xxxvii; 476 F.2d at 351-52).

What does it mean that the CATV must show that "substantially similar receiving equipment located in or near the CATV community" could "equally" receive and project "an image of similar quality" to that used by the CATV system? Clearly one of the advantages of locating an antenna near a station is that a simpler antenna can be used. Even if an antenna could be erected to receive a signal from a substantial distance (*e.g.*, 119 miles from Buffalo to Elmira), a much different antenna would be used if it were located nearer the station. The requirement of identity is confirmed by the court's statement that the antenna must be of "substantially similar sophistication". The court rule is based on an engineering absurdity which

denies the use of different antennas depending on the efficiency of the antenna for that use.

The court had earlier stated that the range of a signal was "a function of many factors, including the current state of broadcast and reception technology" (JA xxxv; 476 F.2d at 350). What then is the meaning of the phrase "in a similar fashion by an equivalent antenna"? Is it possible to show reception in the CATV community by a new or different technology but not of "substantially similar sophistication" or "equivalent" to those being used? The court below left only a small opening for new reception technology despite this Court's discussion of this point in *Fortnightly*.

Thus the test announced by the court below will impose on every CATV with an antenna site more than a "few miles" from its franchise area, the burden of meeting the vague and uncertain test as the price of not being an infringer. Certainly every system using microwave will be forced to litigate with the burden on it, or accede to the copyright owner's demands. And the court's mention of "motivation" in the location of the CATV receiving antenna (JA xxxviii, 476 F.2d 352) raises new issues in litigation. The uncertainty in the test and the inevitable litigation which will follow must necessarly disrupt CATV service to the public.

The consequence of the court's rule is that control over a major segment of the CATV industry will be placed in the hands of the networks and other copyright owners. And as the Department of Justice noted in opposing extension of copyright liability to CATV systems because of harmful anticompetitive conse-

quences, "[o]wnership and control of copyrights is highly concentrated in the networks, movie studios and other television producers."[103] If allowed to stand, the decisions will empower the networks and other companies controlling most television copyrights to solidify and perpetuate the restricted territorial markets for television stations which they assert loudly is in the copyright owner's economic interest.

The anticompetitive implications are put into sharp relief by the measure of the threat to the CATV industry. All broadcasts received by the three systems from the "distant stations" are in jeopardy under the rule of the court below. A television station broadcasts about 300 programs a week. It has been estimated that half of these are copyrighted. While the courts have not ruled on damages for CATV infringement, the statutory minimum is $250 per infringement.[104] If the statutory minimum were levied for each copyrighted program received by the CATV, the potential damages could reach $2,000,000 per "distant" channel per year. This huge potential hangs over the estimated 650 systems now receiving "distant signals".

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[103] Statement by Acting Assistant Attorney General Zimmerman of the Antitrust Division, *Hearings Pursuant to S. Res.* 201 *on S.* 1006 *Before the Subcom. on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 212 (1966).

[104] The issue of damages was postponed by the pre-trial order to a later stage (J.A. 71).

The court below commented that infringement resulting from reception of the Durango station would "probably result in minimal damages" since the Durango station broadcast the same program as the Albuquerque station whose reception was not an infringement. JA xlii; 476 F.2d 354. However, the court did not quantify the CATV's liability.

Petitioners submit that in a case like the present one presenting an issue as to whether the statutory copyright monopoly should be enlarged by judicial decision, a court should take into account the anti-competitive consequences of that extension. To do so is not to intrude on the legislative realm, but simply to recognize the impact of judicial policy which disfavors economic monopolies and hence favors strict judicial construction of the exclusive rights of copyright proprietors. *Cf. Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 228-30 (1964).

D. The decision below disregards the primary policy of the Copyright Act.

The court below justified its interpretation because CATV reception "reduces the potential audience for a program when it is later licensed for exhibition by a local station" "to the injury of the copyright holder" (JA xviii, n.2; 476 F.2d at 342, n.2). This is a repetition of the same court's view in *Fortnightly* that CATV reception disrupted the copyright owners' right to establish exclusive areas of permissible public reception to maximize his profit. 377 F.2d at 878. This focuses the interpretation of the statutory word "performance" on harm or benefit to the copyright owner and overlooks the fact that the copyright owner has received his reward from the broadcaster for granting permission to broadcast the work.

This Court has made clear that rewarding the copyright owner is not the exclusive, or even the primary, policy of the Copyright Act. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration". *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954). The primary consideration is to make available to the public the benefit of the author's works

—"to induce release to the public of the products of [the author's] creative genius" *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

When the copyright owner, upon receiving a reward satisfactory to him, authorizes a station to release a particular work in the form of a broadcast, the broadcast is then released for reception by the public. *Buck* v. *Debaum*, 40 F.2d 734 (S.D. Cal. 1929 said (at 735) that when a copyright owner licenses a broadcast station he authorizes "any 'pick up' out of the air that [is] possible in radio reception."

A broadcast must as a matter of law be "intended to be received by the public" (47 U.S.C. 153(o)). The court below pointed to no principle of copyright law which justifies giving to the copyright owner the power to say that only those using an antenna it approves are members of the public for whom the broadcast was intended while those electing CATV reception service are not. The controlling principle, which we submit *Fortnightly* reaffirmed, is that once a copyright owner has received a reward agreeable to him to authorize the broadcast of the work for public reception, the objective of rewarding the copyright owner sufficiently "to induce release to the public of the products of [the author's] creative genius" (*United States* v. *Paramount Pictures, Inc., supra*, at 158) has been satisfied. So far as that particular broadcast is concerned, the Act's primary policy of making available to the public the particular release of the author's work, i.e., the broadcast, should then be controlling. That policy would be offended by allowing the copyright owner to restrict reception of the broadcast to members of the public using one particular kind of antenna in order to obtain a second reward for reception by members of the public

using another reception mechanism such as CATV reception service.

The primary policy of the Copyright Act argues clearly that the copyright owner should not be entitled to select part of a broadcaster's audience to be barred from receiving the telecast or be a source of a second reward to the copyright owner, if it suits the copyright owner's economic (e.g., market regulation or preservation of the present network structure) interest.[105] The principles announced by this Court in *Aro Manufacturing Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964), show, we submit, that the copyright owner should not be empowered to impose a further charge for the public's enjoyment of a telecast where he has already received a reward for release of his work in the form of a telecast for reception by that public.

III. The Decision Below Conflicts with the Communications Act and F.C.C. Regulation of CATV.

The "distant signal" rule of the court below frustrates the objectives of the F.C.C. regulatory scheme for CATV and is in direct conflict with one part of that scheme. The F.C.C. designed its complex interrelated regulations of CATV, guided, it said, "by the standard of what will best serve the public interest and not by a desire to protect any industry from the impact of new technology."[106] The regulatory scheme had four "interwoven" elements designed as a "single pack-

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[105] See discussion of respondent CBS' special interest in market delineation, *supra* p. 14.

[106] *Cable Television Report and Order, supra* n. 4, ¶ 58, n. 32 at 164.

age".[107] The major elements included television broadcast signal carriage including distant signals carriage, the provision for the use of nonbroadcast channels, and regulations as to minimum channel capacity.[108]

The regulatory scheme the Commission adopted is based upon, and carries out, its statutory obligation to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. § 303(g)) and "to secure the maximum benefits of radio to all the people of the United States."[109] Since each aspect of the F.C.C. regulatory scheme is "interwoven" into a "single package" because "each part has impact on all the others," the rule of law announced below (which undermines the distant-signal regulations) threatens the Commission's entire objective for CATV.

The court below based its rule on a supposed harm to the copyright owner's freedom to exploit his copyright in the way he chooses. But it is precisely the balancing of the public's right to reception and to minimum television service with the copyright owner's interest in exclusivity which formed the basis of the Commission's decision to permit carefully limited reception of distant signals. At the same time, it was this reception service of distant signals the Commission hoped would enable cable television to offer its service and give the public, particularly in smaller communities, the diversity and variety of programming which only those in the larger cities can get on housetop antennas.

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[107] *Id.*, ¶ 11, at 147.

[108] *Id.*

[109] *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 217.

Not only does the decision below threaten to undermine the whole "interwoven" scheme of CATV regulation, but as applied by the court in one situation, it is in direct conflict with one key element in the scheme. Since 1965 the Commission has had in effect a compulsory carriage rule requiring CATV systems to receive certain stations and to give them nonduplication protection. See discussion at n. 15 *supra*. At the relevant dates in this case the compulsory carriage rule required that all systems located within the Grade B contour of a station receive and carry the station upon request and afford it nonduplication protection against more distant stations. The Commission has held that the obligation of carriage and protection arises under its rules "even though a viewable off-the-air picture is not available in any part of the CATV community."[110]

Applying its rule of law, the court below held that the Farmington CATV's reception of the Durango signals was a performance and therefore an infringement, since the signals were blocked by a mountain and parties had stipulated that they could not be received in Farmington (JA xxxix-xlii; 476 F2d at 353-54). Farmington is within the Grade B contour of the Durango station, and pursuant to the F.C.C. rules, after demand by the Durango station for carriage, an agreement was entered into between the Farmington CATV and the station for such carriage.[111] Such a

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[110] *Shen-Heights TV Association, et al.*, 11 F.C.C. 2d 814 (1968) cited in *Cable Television Report and Order, supra* n. 4, ¶ 42, at 159.

[111] To avoid the blockage of the signals by the mountains, the receiving antenna for Durango was placed at the Farmington CATV's antenna site on the mesa, which is about 30 miles away from Farmington, and about the same distance from Durango as Farmington, with the connection from the antenna site to the CATV's cable system in Farmington provided by a microwave link.

construction of the Copyright Act—finding infringement when the CATV was required by F.C.C. regulation to do the acts which are seized on as the basis for such finding—abrogates the policy of statutory construction announced by this Court. See *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959).

The extension of the copyright monopoly under the rule of the court below puts the Copyright Act in conflict with the policies of the Communications Act favoring free public reception of licensed broadcasts. The principle that statutes applicable to the same subject matter should be construed to harmonize rather than conflict has particular application here, where a novel extension of the copyright monopoly would interfere with a comprehensive regulatory scheme under another statute applicable to the same activity. Cf. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Allen Bradley Co.* v. *Local Union No.* 3, 325 U.S. 797, 806 (1945).[112]

IV. The Copyright Act and the Communications Act Compel Recognition of a License Implied-in-Law for Simultaneous Reception by the Public of a Television Broadcast Authorized by the Copyright Proprietor.

The court below discussed in a footnote (JA xxxviii, n. 18; 476 F.2d at 352, n. 18) petitioners' contention that even if the reception of "distant signals' is a performance, the public's right to use CATV reception service to receive the broadcast is protected by a license implied-in-law under the Copyright Act and the Communications Act where the copyright proprietor has

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[112] See also *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973). Respondents, here as in *Hughes*, attempt to subvert by private law suit a decision of a federal regulatory agency specifically authorizing action in the public interest, arrived at after inquiry pursuant to a comprehensive regulatory scheme.

authorized the broadcast for public reception. *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), involved an unauthorized radio broadcast and the Court noted that if the broadcast had been licensed by the copyright owner, a license-in-law might have been implied for the reception and distribution of the broadcast citing *Buck* v. *Debaum*, 40 F.2d 734 (S.D. Cal. 1929), in which such a license was upheld. 283 U.S., at 199, n. 5.

In *Fortnightly* the same court of appeals had considered the issue of a license implied-in-law and had recognized that it was an issue of substance. 377 F.2d at 880-83. There, however, without deciding the issue, the court said that a license might be implied where subscribers could receive the broadcasts on "normal" antennas noting that there is "no reason to deny plaintiff the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas." Id., 883. The court below in the present case refused to reconsider its prior ruling, stating that since a signal is not "distant" if it can be received on antennas in the community, there was no occasion to consider whether there was a license implied-in-law under its reservation in *Fortnightly* (JA xxxviii, n. 18; 476 F.2d at 352, n. 18).

Recognition of a license implied-in-law for public reception (and for aiding public reception) of an authorized broadcast is compelled, we submit, by the primary policy of the Copyright Act and the policy of the Communications Act and is confirmed by broadcasting industry economics.

The primary policy of the Copyright Act is to make available to the public the benefit of the author's work (see discussion *supra*, pp. 68-70). The reward to the copyright owner is a "secondary consideration" justi-

fied only by its contribution to the primary objective. *Mazer* v. *Stein, supra,* 347 U.S. at 219.

This Court has recognized in a long line of cases under the patent and copyright statutes that when the statutory monopolist has released to the public a particular embodiment of the work in return for a reward acceptable to him, so far as that particular embodiment is concerned the secondary policy of rewarding the author (or patentee) has been satisfied. In that situation the primary policy of the law confers on the public an "implied license" to use and enjoy that particular embodiment without having to pay a second royalty to the monopolist. *E.g., Aro Mfg. Co.* v. *Convertible Top Replacement Co., supra,* 377 U.S. at 493-500; *Bobbs Merrill* v. *Straus,* 210 U.S. 339 (1908); *Adams* v. *Burke,* 84 U.S. (17 Wall.) 453, 456 (1873).

When the copyright owners in this case decided to use broadcasting for exploitation of their works, and authorized broadcast of their works for public reception, they released a particular embodiment of their works—the broadcast—for public reception. Respondents received a reward for authorizing the broadcast and releasing it for public reception. What was released was not the copyrighted work but only the particular embodiment in the form of a broadcast. That release exhausted the monopoly with respect to simultaneous reception of that broadcast by the public. The public must accordingly be held to have a license implied-in-law to receive on equipment of its choice, including reception aided by CATV reception service. If the public has the right to use their preferred means of receiving a broadcast, then they may enlist the services of someone, such as a CATV operator, to assist them without incurring liability and must not be com-

pelled to "do it yourself". See *Aro Mfg. Co.* v. *Convertible Top Replacement Co., supra,* at 495, 498 and 500.

The license implied-in-law is grounded also on the Federal Communications Act. The right of the public anywhere to listen to any broadcast has been the objective of communication laws since the Radio Act of 1927.[113] The same policy was embodied in the Communications Act, the "avowed aim" of which this Court said was "to secure the maximum benefit of radio to all the people of the United States".[114] This is confirmed by the definition of broadcasting as "the dissemination of radio communications intended to be received by the public." (47 U.S.C. § 153(o)). Free public reception is denied by a rule which permits a copyright owner to forbid reception or charge a second toll on members of the public who receive the broadcast by a CATV reception service. Moreover, to allow such authority to the copyright owner conflicts with the authority given to the F.C.C. "to establish zones or areas to be served by any station" 47 U.S.C. § 303(h). See discussion *supra,* pp. 50-56.

The policies of the Copyright Act and the Communications Act as applied here are closely related. The primary objective of the Copyright Act is to provide the public with benefit of the artist's work; the policy of the Communications Act is the widest dis-

[113] In introducing the legislation, Senator Dill stated:

> "First, and most important to all, radio in the United States is free. It is so free to the listener in that anybody anywhere may listen in to any broadcasting whatever. . . ." 67 Cong. Rec. 12335 (1926).

[114] *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 217.

semination to the public of broadcasts. It is inconsistent with these objectives to hold, as the court below did, that only members of the public selecting one antenna technology which the court approved are the ones who benefit from these policies. Nothing in the copyright law gives copyright significance to a particular antenna technology, and the F.C.C. conceives of its objectives as making available to the public the benefits of the "new and vital" CATV reception technology.[115]

The application of the policies of the Copyright Act to support an implied license to use a CATV reception service is confirmed by television industry economics. CATV subscribers are included in a television station's coverage area. See discussion *supra,* pp. 56-64. Advertising rates, network rates and license fees to program suppliers turn on the size of the TV audience. And CATV subscribers are counted as part of the audience by the rating services on which the television industry economics depend. The economic realities include the CATV viewers in the audience and coverage area of a station and for whose reception the specific release of the copyrighted work—the broadcast—was intended. The fees paid to the copyright owner by the broadcaster cover, therefore, the release to the CATV subscriber.

It is clear that the public's implied license to receive authorized broadcasts without paying a second royalty must also protect petitioners whose service the public has chosen as the means of exercising their right to receive. Members of the public who are petitioners' subscribers, to exercise their right to receive, must be

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[115] *Memorandum Opinion and Order on Reconsideration, supra* n. 5, ¶ 3.

free to enlist the services of persons such as petitioners without incurring liability for a further copyright fee (see *Aro Manufacturing Co.* v. *Convertible Top Replacement Co., supra,* 377 U.S. at 495, 498-500). Equally, their right to receive must be free of a threat that the copyright owner will prevent the exercise of that right to receive when it suits his economic interest to draw a line around a television station limiting the area of permissible reception.

CONCLUSION

The F.C.C. in 1969 concluded that because the networks were already dominant factors in the television field, "any further expansion of their ownership or control into the new and growing cable television industry was per se undesirable . . ." (see pp. 37-38 *supra*). In contrast, the decision of the court below expands the networks' control over CATV by judicial extension of the limited statutory copyright monopoly. Under the rule of the court below the networks and major copyright owners will be able to supplant F.C.C. regulation of CATV by private copyright regulation as it suits their own economic interest. This judicial expansion of copyright contravenes the rationale and holding of *Fortnightly,* disregards the primary policy of the Copyright Act, and abrogates the policy of the

Communications Act that the public has the right to receive all broadcasts.

The judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX

Statutes Involved

1. *Copyright Act, as amended.* Section 1(c) and (d) of the Copyright Act (17 U.S.C. §§ 1(c), (d) (1970)) provides as follows :

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
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> • • •
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to produce the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

2. *Communications Act of 1934, as amended.* Section 1, 3(o), 303(c), (d) and (h), 307(b) and 325(a) (47 U.S.C. §§ 151, 153(o), 303(c), (d) and (h), 307 (b) and 325(a) (1970)) provide as follows:

Sec. 151. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

Sec. 153(o). " 'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

Sec. 303. "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . ."

• • •

(c). "Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;"

• • •

(d). "Determine the location of classes of stations or individual stations;"

* * *

(h). "Have authority to establish areas or zones to be served by any station."

Sec. 307(b). "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Sec. 325(a). "No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."